

SITING COMMITTEE WORKSHOP  
BEFORE THE  
CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of: )  
 )  
RULEMAKING TO MODIFY RULES OF ) Docket No.  
PRACTICE AND PROCEDURE FOR ) 00-SIT-1  
POWER PLANT APPLICATIONS )  
\_\_\_\_\_ )

CALIFORNIA ENERGY COMMISSION  
1516 NINTH STREET  
HEARING ROOM A  
SACRAMENTO, CALIFORNIA

MONDAY, JULY 23, 2001

1:33 P.M.

Reported by:  
Valorie Phillips  
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMISSIONERS PRESENT

Robert A. Laurie, Presiding Member

Robert Pernell, Associate Member

Ellen Townsend-Smith, Advisor

Mignon Marks, Advisor

STAFF PRESENT

Richard Buell

William Chamberlain

David Mundstock

PUBLIC ADVISER

Roberta Mendonca

ALSO PRESENT

Marc D. Joseph, Attorney  
Adams, Broadwell, Joseph & Cardozo  
California Unions for Reliable Energy

Issa Ajlouny

Anne E. Simon, Attorney  
Communities for a Better Environment

Tony Chapman  
Sportsmens Yacht Club

Karen Schambach  
Public Employees for Environmental Responsibility

Joan Wood

Steven Kelly  
Independent Energy Producers Association

ALSO PRESENT

John Burton

Steve Kohn

Sacramento Municipal Utility District

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

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1 P R O C E E D I N G S

2 1:33 p.m.

3 PRESIDING MEMBER LAURIE: Ladies and  
4 gentlemen, good afternoon. My name is Robert  
5 Laurie, Presiding Member of the Siting Committee.  
6 To my right is my colleague on the Committee,  
7 Commissioner Robert Pernell. To my left is my  
8 Advisor, Ms. Mignon Marks.

9 We're here for the purpose of conducting  
10 a public workshop on proposed siting regulations  
11 pursuant to a rulemaking OIR-01-SIT-1.

12 What I'm going to ask is to have Mr.  
13 Buell go over the agenda and see if there's any  
14 questions regarding the process that we're going  
15 to follow today. Mr. Buell.

16 MR. BUELL: Yes, my name is Richard  
17 Buell. I'm the Siting Project Manager for this  
18 project, the OIR.

19 The agenda that we're proposing today is  
20 for staff to begin the discussion by explaining  
21 the rulemaking process to the parties, and giving  
22 an idea of what the timeframe is for various  
23 activities that will take place.

24 Then what I'd like to do is proceed by  
25 section of the regulations. I'll start off by

1 giving a brief description of what the section  
2 deals with and what's being modified, followed by  
3 staff comments. And then I'd like to go around  
4 the table and receive comments from all the other  
5 parties that may want to speak to those sections  
6 of the regulations.

7 PRESIDING MEMBER LAURIE: Okay. We have  
8 some members of the public seated at the table.  
9 Why is that?

10 MR. BUELL: I'd like to accommodate as  
11 many people at the front table as we can get so  
12 that we can have a roundtable.

13 PRESIDING MEMBER LAURIE: Okay, well, I  
14 have a discomfort about that because we're either  
15 going to have folks at the table or folks sitting  
16 in the back. And you can't have both. I mean why  
17 have a few select individuals up front when folks  
18 in the back may want to comment, as well. What's  
19 the advantage to that?

20 MR. BUELL: There's no advantage. I did  
21 invite all those that wanted to speak to sit at  
22 the front table. Those that you saw at the table  
23 had taken advantage of that invitation. And those  
24 that are in the audience have not.

25 PRESIDING MEMBER LAURIE: Ms. Mendonca,



1 did you have any comments at this point?

2 MS. MENDONCA: Just as a process

3 question? Are you --

4 PRESIDING MEMBER LAURIE: Yes, process.

5 MS. MENDONCA: -- interested in blue

6 cards today, or will we go back to the format

7 which was come to the table and add your comment

8 as people go around?

9 PRESIDING MEMBER LAURIE: Yes, I don't

10 think we need blue cards. We'll take everybody

11 that wants to offer comment.

12 Commissioner Pernell, did you want to

13 offer any comments this morning, sir -- this

14 afternoon?

15 COMMISSIONER PERNELL: I'd just like to

16 welcome everyone here and we are interested in

17 your comments as it relates to this workshop. We

18 intend to hear everyone, as we do, as I say in

19 siting meetings, we want to be professional at

20 this. And so please no outbursts of applause or

21 boos or any of that. Thank you.

22 PRESIDING MEMBER LAURIE: Thank you.

23 Joining us is Ms. Ellie Townsend-Smith,

24 Commissioner Pernell's Advisor.

25 At this point, Mr. Buell, did you want

1 to summarize for us, please?

2 MR. BUELL: Yes. I'd like to start with  
3 a summary of what this OIR is, the process that's  
4 likely to take place.

5 Back on June the 27th the Commission  
6 adopted an order instituting rulemaking, which is  
7 the first step in the process. This workshop is  
8 not called by any regulations, but it is an  
9 opportunity for us to sunshine the regulation  
10 changes that the Commission is considering to  
11 receive public comments.

12 The first formal step in the process  
13 would be a notice of proposed action which we'd  
14 file with the Office of Administrative Law, which  
15 is a governmental agency that reviews state  
16 agencies' regulations.

17 We would hope to file with them early in  
18 August or by mid August at the latest. There's a  
19 number of forms that will be filed at that time,  
20 and when we file that we will be filing the  
21 proposed regulations as the Commission may wish to  
22 pursue at that time.

23 That will start the clock for a 45-day  
24 review. At the end of that 45-day review, having  
25 received comments, the Commission may schedule a

1 business meeting to consider those regulations.

2 At that time, the Commission, if they  
3 adopt the regulations, would go make a formal  
4 filing to OAL, the Office of Administrative Law.  
5 If not, if there's changes in the regulations,  
6 there will be an opportunity to file 15-day  
7 language, and that would generally delay the  
8 adoption of the regulations by approximately 30  
9 days from the initial business meeting.

10 So, it's important to try to have the  
11 regulations figured out by that time, or prior to  
12 that time, so that we don't need that extra step  
13 in the process.

14 If all goes well, we should have  
15 regulations adopted by the Commission by late  
16 November. And adopted and in effect by January 1  
17 of next year.

18 That kind of summarizes the process that  
19 we're dealing with. With your permission why  
20 don't we get started on the various regulations?

21 PRESIDING MEMBER LAURIE: Let me ask if  
22 any member of the public has a question regarding  
23 the agenda that we're going to be following today.  
24 Seeing none, please proceed.

25 MR. BUELL: The first section of the

1       initial draft regulations is section 1212 of the  
2       regulations that deal with rules of evidence and  
3       hearing procedures.

4               The Commission is considering changes in  
5       sections (b), (c) and (e) of those regulations.  
6       The intent here is to try to clarify the rules of  
7       evidence and what information or what actions the  
8       Hearing Officer and Committee can take during a  
9       case.

10              Staff has no comments on this section,  
11       and I'd like to turn it over to any other party  
12       that may have some comments they'd like to add.

13              PRESIDING MEMBER LAURIE:   Okay, what  
14       we're going to do at this point is call on those  
15       who choose to comment on the changes and the  
16       proposed changes to section 1212.   All those  
17       wishing to comment on that section, please raise  
18       your hand.

19              Okay, we'll start with the folks at the  
20       table first.   And then we'll go to the remainder  
21       of the audience.   If you would introduce yourself  
22       and state your organization affiliation, if any.  
23       And then offer comments.

24              Mr. Joseph, good morning.

25              MR. JOSEPH:   Thank you, Commissioner

1 Laurie, Commissioner Pernell. I appreciate the  
2 invitation from Mr. Buell to sit at the table.  
3 Hopefully it will make this interaction more  
4 productive.

5 PRESIDING MEMBER LAURIE: Could you  
6 state your name for the record, please.

7 MR. JOSEPH: My name is Marc Joseph, and  
8 I represent the California Unions for Reliable  
9 Energy.

10 As the Commissioners are no doubt aware,  
11 the Commission in the last two-plus years has  
12 approved 16 projects, 16 major power plants. And  
13 for the vast majority of those projects the issues  
14 that the Commission has faced have been resolved  
15 in workshops with the staff.

16 The evidentiary hearings on most of  
17 those projects have been relatively brief, and  
18 where there have been outstanding issues, the  
19 evidentiary hearings have been focused on the  
20 outstanding issues.

21 There obviously have been a few  
22 exceptions to that. And in a very small handful  
23 of cases there have been very substantial  
24 exceptions to that generalization. There have  
25 been several very controversial projects which

1 have had many and extended hearings.

2 It's our position that these exceptional  
3 projects should not drive the creation of a  
4 general rule, the exceptions should not create the  
5 general rule.

6 The general rule that all parties are  
7 entitled to present evidence upon which the  
8 Commission can make its decision is a rule which  
9 is working in the overwhelming majority of cases.

10 Now, the Commission, in its current  
11 rules, is required to make decisions based on the  
12 evidence in the record. And it's absolutely  
13 imperative that any party be entitled to add to or  
14 effect that evidentiary record if that's going to  
15 be the basis of what the Commission is going to  
16 make its decision on.

17 PRESIDING MEMBER LAURIE: Let me  
18 interrupt for a second. Mr. Buell, with a  
19 question. As I read 1212(b), and understanding my  
20 intent thereof or understanding my intent of what  
21 that language says.

22 That language does not inhibit or  
23 prohibit written testimony, only follow-up oral  
24 testimony. Is that your understanding? And  
25 cross-examination on the written testimony.

1                   MR. BUELL: I believe that is correct,  
2                   although that question might be better put to  
3                   either Bill Chamberlain or to Dave Mundstock.

4                   PRESIDING MEMBER LAURIE: Okay. Mr.  
5                   Joseph, if -- and perhaps the wording needs to be  
6                   clarified -- but if the intent is to not inhibit  
7                   written testimony, but only address the issue of  
8                   follow-up oral testimony or cross-examination  
9                   during the hearing process, does that change your  
10                  comment at all?

11                  MR. JOSEPH: Actually, Commissioner  
12                  Laurie, the very next thing I was about to say is  
13                  that I think the clarifications of paragraph (b)  
14                  are very useful and helpful, and make it clear  
15                  that the Presiding Member has the ability to  
16                  control the use of oral testimony and cross-  
17                  examination in appropriate circumstances, and with  
18                  an objective standard.

19                  And so I was going to actually support  
20                  the improvement of paragraph (b). I think that's  
21                  a very useful paragraph. I think that is, in  
22                  fact, the standard which is implicit in any  
23                  evidentiary hearing, and that is that the  
24                  Presiding Member can limit oral testimony or  
25                  cross-examination when there are not disputed

1 issues of fact. And that's absolutely  
2 appropriate.

3 PRESIDING MEMBER LAURIE: Thank you.

4 COMMISSIONER PERNELL: So, Mr. Joseph,  
5 are you then in favor of paragraph (b)?

6 MR. JOSEPH: Yes. We think paragraph  
7 (b) is a fine clarification of what is generally  
8 existing practice.

9 COMMISSIONER PERNELL: Okay.

10 MR. JOSEPH: I distinguish that from  
11 paragraph (c) and paragraph (e).

12 Paragraph (c) gives the Presiding Member  
13 unfettered discretion to restrict the rights of an  
14 intervenor to present the testimony of witnesses  
15 or to conduct cross-examination.

16 And that limitation on the ability to  
17 present evidence and to cross-examine another  
18 party's evidence is not appropriate. The public  
19 should be able to challenge either an applicant or  
20 a staff witness, and present its own witness about  
21 disputed issues of material fact in the case.

22 Similarly, paragraph (e), which refers  
23 to Government Code sections 11445.10 and  
24 following, also gives the Presiding Member  
25 unfettered discretion to simply preclude an



1       intervenor from participating in the evidentiary  
2       hearings of the case, and to preclude the use of  
3       any discovery.

4               And that is not appropriate; and that's  
5       inconsistent with the Commission's long and  
6       worthwhile history of encouraging public  
7       participation.

8               I think to the extent that the  
9       Commission has had problems with hearings being  
10      excessively cumbersome, paragraph (b) should allow  
11      you to solve the problem. And paragraph (c) and  
12      (d), on the other hand, unnecessarily restrict the  
13      ability of the public to participate.

14              PRESIDING MEMBER LAURIE: And --

15              COMMISSIONER PERNELL: Paragraph (c)  
16      and --

17              MR. JOSEPH: And (e).

18              COMMISSIONER PERNELL: -- and (e), okay.

19              PRESIDING MEMBER LAURIE: If (c) and (e)  
20      were left alone would they be in conflict with an  
21      amended (b)? All or a portion thereof?

22              MR. JOSEPH: I don't think so. I think  
23      you can read (c) as being consistent with (b).  
24      And, you know, I have always read (c) as giving  
25      the Presiding Member the opportunity to limit the

1 participation when participation is on matters  
2 that are not relevant.

3 And that's not inconsistent with the  
4 proposal in (b).

5 PRESIDING MEMBER LAURIE: Okay. Thank  
6 you, sir.

7 MR. JOSEPH: Thank you.

8 PRESIDING MEMBER LAURIE: Anything else  
9 on that section?

10 COMMISSIONER PERNELL: Just one  
11 question. On (e) you have the government, isn't  
12 that giving the Presiding Member discretion on  
13 whether, how to run the hearing, whether it's  
14 informal or formal?

15 MR. JOSEPH: It does that, and actually  
16 it does a little more than that, as well. That  
17 cross-reference refers to the sections in the  
18 Government Code which include 11445.40, and that  
19 section, in paragraph (b) of that section it says:

20 The Presiding Officer shall permit the  
21 parties and may permit others to offer  
22 written or oral comments on the issues. The  
23 Presiding Officer may limit the use of  
24 witnesses, testimony, evidence and argument,  
25 and may limit or eliminate the use of

1           pleadings, intervention, discovery,  
2           prehearing conference and rebuttal.

3           And that seems to give the Presiding  
4   Member carte blanche to decide, well, in this case  
5   other parties are not going to be allowed to have  
6   discovery or get any evidence or participate in  
7   the proceedings.

8           COMMISSIONER PERNELL: Okay, what's the  
9   additional section you just read?

10          MR. JOSEPH: The Government Code section  
11   is 11445.40.

12          COMMISSIONER PERNELL: Okay.

13          MR. JOSEPH: Thank you.

14          PRESIDING MEMBER LAURIE: Thank you,  
15   sir. Mr. Ajlouny.

16          MR. AJLOUNY: Yes, my name is Issa  
17   Ajlouny. And was an intervenor, still an  
18   intervenor at Metcalf, so I've had quite a bit of  
19   experience in the last couple of years.

20          There's one thing I do like on that  
21   section 1212 in (b), crossing off oral and  
22   written, making all. That's about the only thing  
23   that I can see that's going to benefit me as a  
24   public member of the process.

25          If you look at the second part of (b),

1 the Presiding Member may restrict the use of oral  
2 testimony and cross-examination on written  
3 testimony indicates no, and goes on.

4 I just can only reflect on my  
5 experience, Commissioner Laurie, and you were  
6 there and you heard most of the things I said and  
7 how it all went.

8 Am I to understand that if there's some  
9 testimony that I get in the mail from an applicant  
10 or from staff, and I get a chance to read it, and  
11 I want to cross-examine, I can go to that meeting  
12 and find out that I can't cross-examine because  
13 one of the Presiding Members said I couldn't? I  
14 mean, is that what that means?

15 PRESIDING MEMBER LAURIE: I think the  
16 intent is that if the Committee, Presiding Member  
17 speaking for the Committee, determines that, in  
18 fact, there are no genuine disputes of material  
19 fact, that is it's understood what the issues are,  
20 there may be a disagreement but it's understood  
21 what the issues are, and it is felt that any  
22 additional testimony will not add to the education  
23 of the Committee, then the Committee is free to  
24 restrict additional testimony.

25 MR. AJLOUNY: But how are you going to

1 know that if you don't give the public the other  
2 part of the process, the chance to cross-examine  
3 and maybe bring out things you didn't think of?  
4 It's just hard for me to fathom that.

5 So I guess that's where my concern is,  
6 that there's only one person I know and that's my  
7 God who knows what's going to happen in the future  
8 and what people are thinking.

9 So it kind of offends me that someone  
10 here on earth can pretty much know what I'm  
11 thinking and what I'm going to cross-examine, and  
12 what the outcome's going to be.

13 So I really have a hard time with (b),  
14 (c) and (e). And basically for the fact that I  
15 feel that the public was able to bring out, as a  
16 matter of fact, a number of things that,  
17 Commissioner Laurie, you seemed to, from your  
18 decision, agree with the public. And it wasn't  
19 out in public until we were able to cross-examine  
20 and bring it up. And noise is one of the issues.

21 PRESIDING MEMBER LAURIE: Okay.

22 MR. AJLOUNY: So that's just an example.

23 PRESIDING MEMBER LAURIE: You'd think  
24 I'd be able to pronounce your last name correctly  
25 after all this time, wouldn't that be right, Issa?

1 MR. AJLOUNY: Yeah.

2 PRESIDING MEMBER LAURIE: Thank you.

3 Anybody else in the audience? Yes, ma'am.

4 MS. SIMON: Thank you. My name is Anne  
5 Simon; I'm Senior Attorney at Communities for a  
6 Better Environment. We have offices in Oakland  
7 and Huntington Park

8 And I would like to thank the  
9 Commissioners for holding this workshop. I think  
10 it's -- I hope it will be helpful to you. And I  
11 know it's helpful to us.

12 I would like to support the comments  
13 that Mr. Joseph made about sections (c) and (e) of  
14 the proposed revision, particularly taken  
15 together. They just create unlimited discretion  
16 in the Presiding Member with no standards for how,  
17 from case to case, in order to assure consistency  
18 in the Commission's adjudication, that discretion  
19 should be exercised in shaping the availability of  
20 discovery or cross-examination or pleadings, or  
21 indeed, even intervention in the case of the  
22 informal hearing process.

23 And that is unnecessary, it seems to me,  
24 for the Commission to be able to do its job  
25 effectively, creating the potential for

1 inconsistency is unnecessary and legally  
2 troublesome. It also, I believe, is not necessary  
3 for the Commission to expand the discretion of the  
4 Presiding Member as significantly as these  
5 sections would in order to have some reasonable  
6 prospect of managing the hearing process.

7           The current prehearing conference  
8 procedure, for example, in section 1718, can be  
9 used to make sure that people who are parties are  
10 up front in advance of the submission of testimony  
11 about what the issues are, and to get clarity  
12 about what the likely issues are going to be,  
13 without preemptively cutting off the possibility  
14 for cross-examination or for other formal hearing  
15 devices.

16           And it has been, I believe, the  
17 experience of many intervenors, not just  
18 Communities for a Better Environment, that the  
19 availability of formal hearing devices has made it  
20 possible for members of the public, whether they  
21 are unorganized individuals or whether they're  
22 organized groups, to be able to present useful  
23 information to the Committee and subsequently to  
24 the Commission for its deliberations that wasn't  
25 known at the beginning of the proceeding.

1                   For many community groups or unorganized  
2           individuals it takes awhile to gear up, to  
3           understand the issues, to learn from the workshops  
4           and from the other activities in the case what it  
5           is that you need to do to present useful  
6           information to the Committee.

7                   And the fear that we have about section  
8           (c) and (e), as proposed in the revision, is that  
9           they will prematurely cut off not only the  
10          democratic opportunity of people to participate,  
11          but also the Commission from sources of relevant  
12          information because people just won't know early  
13          enough.

14                  I would, however, also like to offer  
15          some dissent on section (b). CBE certainly  
16          supports the notion of written testimony in  
17          advance of the hearing. That helps everyone  
18          because it enables everyone to know what is going  
19          on, and it also, in many circumstances, can reduce  
20          the need for discovery, which is a good thing.

21                  However, I think that as drafted (b)  
22          goes too far in allowing the Presiding Member to  
23          cut off cross-examination on the basis of the  
24          written testimony.

25                  And I would like, with your indulgence,



1 to make just two comments about that. One is that  
2 just from a legalistic point of view this is like  
3 what a judge does in a court in a summary judgment  
4 proceeding.

5 The Code of Civil Procedure, section  
6 473, subsection (c), which governs summary  
7 judgment goes on for three densely printed, large  
8 pages. All about the standards and procedures for  
9 summary judgment. Because it has been the  
10 experience of the courts and the legislature that  
11 the process of concluding legal issues prior to a  
12 trial with cross-examination, while very valuable,  
13 is very complicated, in order to make sure that  
14 the rights of the parties are respected, and to  
15 maximize the possibility that the right  
16 conclusions, both factual and legal, come out of  
17 the proceeding.

18 The way 1212(b)'s revision is drafted,  
19 the Commission is not giving itself enough  
20 guidance to make sure that this kind of process  
21 will work both fairly and effectively as to  
22 outcome.

23 The second point I would like to make  
24 about this which is also related to a good thing  
25 about the Commission's current procedures, as

1 distinct from a bad thing about court procedures,  
2 from the point of view of actually getting out  
3 useful information, is that this draft (b) seems  
4 to suggest that it would be possible for any  
5 party, including the applicant, to be cut off from  
6 cross-examining the staff on a particular point,  
7 if that party did not put in opposing testimony in  
8 writing in advance on that very point.

9 From the point of view of community  
10 groups and many intervenors, that means that even  
11 if there is something that is very specific about  
12 the project that could be improved by four good  
13 questions to the staff member who has presented  
14 the staff's testimony, one would have to go out  
15 and hire someone to prepare written testimony on  
16 the same point.

17 PRESIDING MEMBER LAURIE: Can you point  
18 me to the specific language that has you most  
19 concerned that would require written testimony as  
20 a prelude to cross-examination?

21 MS. SIMON: Yes, Commissioner. The last  
22 sentence of the redraft of (b). It says: When  
23 the written testimony indicates," which seems to  
24 me to suggest that the Presiding Member would make  
25 this decision about oral testimony and cross-

1 examination solely on the basis of the written  
2 testimony submitted.

3 PRESIDING MEMBER LAURIE: So if you were  
4 an intervening party and you indicated that you  
5 had a disagreement as to a material fact, based  
6 upon the other parties' written testimony, you  
7 believe that this language would preclude you from  
8 making inquiry, or it would permit the Presiding  
9 Member to preclude you from making inquiry?

10 MS. SIMON: Yes, I do, at least as it's  
11 written. I believe that's a danger. And an  
12 unnecessary danger. It seems to me that the  
13 Commission might want to do something like have,  
14 in addition to written testimony, written  
15 statements of things at issue to cover this  
16 problem, which is, certainly in my own experience,  
17 real, that as to some issues one doesn't need to  
18 multiply the written testimony. One only needs to  
19 be able to ask the staff or the applicant's expert  
20 whether certain changes in configuration or  
21 certain changes in mitigation measures, which are  
22 a particular concern to intervenors, would work,  
23 without having to go through the trouble and  
24 expense to community groups and the multiplication  
25 of paper for the Committee and all the other

1 parties of having someone else work it up full  
2 scale, when there's a relatively narrow  
3 supplemental area of dispute.

4 And I'm concerned that this language, at  
5 any rate, would give the Presiding Member the  
6 discretion to cut that off with no alternative  
7 avenue of elucidating that all it is, is this.

8 COMMISSIONER PERNELL: Is there any  
9 alternative language you have to fix that, your  
10 concerns?

11 MS. SIMON: I think that I would -- I  
12 have not drafted alternative language. We intend  
13 to file formal written comments, and we'll include  
14 a proposed alternative in that by the filing date.

15 But I think our preference would be that  
16 the Presiding Member's discretion to restrict the  
17 use of oral testimony and cross-examination should  
18 be as the result of a thorough investigation at  
19 the prehearing conference of what the issues are,  
20 Rather than waiting until the submission of the  
21 written testimony; that is, to have some  
22 interaction. Because otherwise the concerned  
23 intervenor may be filing completely useless, as  
24 well as expensive and time consuming, written  
25 testimony to guard against the possibility the

1 Presiding Member would decide that there's no  
2 genuine issue.

3 So, I would think that there is a case  
4 management approach to this that may solve the  
5 problem as efficiently and potentially more  
6 fairly.

7 COMMISSIONER PERNELL: Okay. And just  
8 so I can be clear, as it relates to (b), the  
9 written testimony in advance of the hearing is  
10 probably a useful tool for all of us. And the one  
11 issue that you are concerned about is the  
12 Presiding Member's discretion on the cross-  
13 examination and the oral testimony?

14 MS. SIMON: That's correct, Commissioner  
15 Pernell.

16 COMMISSIONER PERNELL: Thank you.

17 MS. SIMON: Thank you.

18 PRESIDING MEMBER LAURIE: Okay, well,  
19 I'm a little confused on that point. Are you  
20 objecting to having the Presiding Member exercise  
21 discretion in limiting oral testimony and cross-  
22 examination?

23 MS. SIMON: The Presiding Member already  
24 has that discretion in the current rules. What  
25 we're concerned about is that this section appears

1       to be a kind of pseudo summary judgment procedure,  
2       which puts a great deal of pressure on getting in  
3       written testimony. And puts the Presiding  
4       Member's decision about limits on cross-  
5       examination solely on the basis of the written  
6       testimony.

7               And I think that goes too far toward  
8       essentially pricing out of effective participation  
9       intervening groups that have a small issue that  
10      can be effectively explored through cross-  
11      examination, either of the staff or the applicant,  
12      or both, that may be significant, but that they  
13      could not afford to cover with written testimony.

14             And I believe that the vice that the  
15      revision is trying to get at can be gotten at  
16      without running that risk.

17             PRESIDING MEMBER LAURIE: Question.  
18      Does your organization represent interests in  
19      front of local governments?

20             MS. SIMON: Yes, we do. We represent  
21      our members.

22             PRESIDING MEMBER LAURIE: Okay. If you  
23      had a local government proceeding, some  
24      development project, and you had a group that  
25      wanted to raise a small question during the

1       hearing process, how would they go about doing  
2       that?

3               MS. SIMON: Well, that depends on the  
4       agency, because most agencies don't have the  
5       formal safeguards that the Energy Commission does  
6       of cross-examination being available --

7               PRESIDING MEMBER LAURIE: Well, that's  
8       what I'm asking. I don't know any local agency  
9       that has that. So that's what I'm asking, if you  
10      had a local government project and you had an  
11      interest group that wanted to get its point  
12      across, how would it do that?

13              MS. SIMON: We'd have to either do it  
14      in -- well, I'm hypothesizing a group that does  
15      not have an available expert -- would either have  
16      to do it in nonexpert fashion by having a staff  
17      person or a resident of the community just make  
18      the statement and hope the presiding body took it  
19      seriously enough to go back to the staff.

20              Or would have to ask the presiding body,  
21      which we have done on occasion and so have other  
22      groups, to continue the proceeding so that an  
23      opportunity to find a way to make that point can  
24      be found.

25              Nobody likes doing that.

1                   PRESIDING MEMBER LAURIE: I guess what  
2           I'm trying to get at is let's say you do get  
3           authority to bring your own expert, and the expert  
4           comments on the record, and it's thus considered.  
5           It's done without cross-examination, right, so  
6           that you have applicant's presentation, and you  
7           have other parties' or other interests' comments,  
8           and all that is part of the record upon which the  
9           decision-making body makes their judgment, is that  
10          right?

11                  MS. SIMON: That's right, but the  
12          Commission does have cross-examination, and it's  
13          required as to some things in the proceeding. And  
14          therefore, the question here comes back to how the  
15          discretion to allow cross-examination and oral  
16          testimony in some circumstances rather than others  
17          will be exercised.

18                  Right now the draft (b) doesn't really  
19          have standards that in CBE's view would make it  
20          relatively safe to say that that discretion will  
21          be exercised consistently across cases and across  
22          classes of applicants and intervenors.

23                  I've been focusing on an example that I  
24          think is fairly common, the circumstance in which  
25          one Presiding Member could go one way and one



1       Presiding Member could go another, in which I  
2       think there would be agreement that the actual  
3       issue is one that should be aired. And that's why  
4       I have been focusing on that.

5               I certainly agree that there are many  
6       other forums in which decisions are made without  
7       benefit of cross-examination. But since this  
8       isn't one, I think it's important for the  
9       Commission to structure any changes that it makes  
10      in a way that will maximize the consistency and  
11      equity of the application of its fundamental  
12      rules.

13             PRESIDING MEMBER LAURIE: Very good,  
14      thank you, Ms. Simon.

15             Anybody else in the audience?

16             MR. CHAPMAN: Tony Chapman, Intervenor  
17      from Sportsmens Yacht Club in Antioch, California.

18             I want to reiterate on this angle of the  
19      comments so far in respect to the cross-  
20      examination. The way I read (b) and what concerns  
21      me about 1212(b) is the instances where, first  
22      off, where material facts may not be contended,  
23      but they may not have been reflected in the light  
24      that an intervenor might need them reflected in.

25             And I know in my case and in my

1       situation I approached the final hearings with the  
2       greatest of fear of having to come up with  
3       testimony as an intervenor. That was going to be  
4       a massive task that I wasn't sure that we could  
5       succeed at.

6               PRESIDING MEMBER LAURIE: Can I ask you  
7       about that for a minute?

8               MR. CHAPMAN: Yes.

9               PRESIDING MEMBER LAURIE: So your  
10       concern during your hearing was that it would be a  
11       burden for you to be presenting the evidence?

12              MR. CHAPMAN: It would have, yes.

13              PRESIDING MEMBER LAURIE: Because of the  
14       formality, or because -- for example, --

15              MR. CHAPMAN: Well, okay.

16              PRESIDING MEMBER LAURIE: -- let's not  
17       use your case as an example. Let's use a local  
18       case, you had a concern about a residential  
19       subdivision. And you were most concerned about  
20       traffic circulation.

21              Well, you'd show up, like you're doing  
22       now, and you would comment as to what the traffic  
23       circulation problems are.

24              Why would not the same be true for a  
25       power plant application?

1                   MR. CHAPMAN: The cross-examination is  
2                   the only opportunity that an intervenor or a  
3                   member of the public would have to test the  
4                   evidence.

5                   I don't believe they are -- they're not  
6                   required to, to my understanding. And in lots  
7                   of -- most situations there's no need for their  
8                   testimony, but there is need for their test of the  
9                   evidence.

10                  And in these cases it is the applicant  
11                  that has the burden of evidence to create the  
12                  evidence needed to approve the case. So, it's the  
13                  intervenors' opportunity to then test that  
14                  evidence and see if it stands up to that test.

15                  Your example, I'm a little concerned by  
16                  your example of using a local agency and asking  
17                  well, how would you approach that. You have a  
18                  system now that I believe is worth preserving, not  
19                  degrading it so that it meets some lower level of  
20                  example.

21                  Right now you have a system that can be  
22                  exemplified to other agencies for them to follow  
23                  your example, rather than you stepping back to  
24                  theirs.

25                  Thank you.

1                   PRESIDING MEMBER LAURIE:   Okay, thank  
2                   you, sir, very much.   Anybody else -- just a  
3                   minute, Mr. Ajlouny -- yes, ma'am.   Good  
4                   afternoon.

5                   MS. SCHAMBACH:   I'm Karen Schambach,  
6                   Public Employees for Environmental Responsibility.  
7                   I'm going to submit written comments --

8                   COMMISSIONER PERNELL:   Excuse me, did  
9                   you say public employees for --

10                  MS. SCHAMBACH:   Public Employees for  
11                  Environmental Responsibility.

12                  COMMISSIONER PERNELL:   Okay.

13                  MS. SCHAMBACH:   Anyway, I'm going to  
14                  submit written comments, but I wanted to just read  
15                  a bit of these.

16                  PEER supports public employees in their  
17                  efforts to protect the environment, including  
18                  public disclosure of government actions that are  
19                  contrary to environmental protection or to  
20                  objective evaluation of environmental impacts and  
21                  mitigation measures.

22                  PEER is concerned about the California  
23                  Energy Commission's initial draft modifications to  
24                  the power plant siting regulations for several  
25                  reasons.

1           First, a number of the proposed changes  
2       to the regulations would restrict the rights of  
3       the public to participate in siting cases. Such  
4       participation is crucial, not only to fulfill the  
5       mandate of the enabling legislation of the CEC to  
6       have an open, public process, but also to provide  
7       citizens the opportunity to express their concerns  
8       and provide information to the Commission, its  
9       staff, public agencies, the applicant and others  
10      regarding environmental topics relevant to power  
11      plant siting projects.

12           A number of the proposed changes to the  
13      siting regulations would limit public noticing  
14      requirements. Several reasons have been given for  
15      limiting noticing requirements, including that the  
16      public should be able to trust the CEC staff.

17           I would like to note that these comments  
18      actually were written by some CEC Staff and PEER  
19      is presenting this on their behalf.

20           PRESIDING MEMBER LAURIE: Okay, I'm  
21      sorry, say that again?

22           MS. SCHAMBACH: The comments that I'm  
23      reading were actually written by some CEC Staff  
24      members and PEER is presenting them on their  
25      behalf.

1                   COMMISSIONER PERNELL: We have a letter  
2                   from PEER. Is this --

3                   MS. SCHAMBACH: That's it.

4                   COMMISSIONER PERNELL: This is it?

5                   MS. SCHAMBACH: Right.

6                   COMMISSIONER PERNELL: So it has -- and  
7                   then PEER, just for my clarification, PEER  
8                   represents public employees who are concerned  
9                   about issues of this sort?

10                  MS. SCHAMBACH: Exactly.

11                  PRESIDING MEMBER LAURIE: And so --  
12                  well, the comments are actually comments of some  
13                  Energy Commission employees that presented it to  
14                  PEER?

15                  MS. SCHAMBACH: That's correct.

16                  COMMISSIONER PERNELL: But not just -- I  
17                  mean they're all -- I'm assuming you represent  
18                  more than just public employees at the Energy  
19                  Commission.

20                  MS. SCHAMBACH: Right. We represent  
21                  federal, state, county, city, any public employee  
22                  interested in environmental issues, and provide  
23                  them a way to voice their concerns without coming  
24                  forward personally and subjecting themselves to  
25                  retaliation possibly.

1                   COMMISSIONER PERNELL: Right, so I guess  
2                   my question is these comments also represent  
3                   public employees outside of the Energy Commission.

4                   MS. SCHAMBACH: No, these comments were  
5                   written by staff within CEC.

6                   COMMISSIONER PERNELL: Okay.

7                   PRESIDING MEMBER LAURIE: Okay. Thank  
8                   you, ma'am, very much.

9                   MS. SCHAMBACH: Thank you.

10                  MS. WOOD: Hello, my name is Joan Wood.  
11                  I'm a Sutter County farm owner. I faxed some  
12                  comments earlier. I'm not sure if they've been  
13                  submitted yet.

14                  MS. MENDONCA: They're in the packet.

15                  MS. WOOD: Oh, okay. This is to  
16                  slightly enlarge upon that, and I will be sending  
17                  other comments on the July 30th deadline.

18                  In our country it's traditional that the  
19                  public has input into decisions that may affect  
20                  their lives, and usually it's through elected  
21                  representatives. I think in a situation like this  
22                  where you members are appointed, it distances the  
23                  public a little bit more.

24                  Unfortunately, large numbers of the  
25                  public don't have the time to appear in meetings

1       like this, and a large number of the public think  
2       that it wouldn't do any good anyway. And  
3       therefore, you're stuck with people like me that  
4       do have the time to do it. And I know that the  
5       public is often a large impediment to efficiency.

6               But I would like to urge that you not  
7       add further barriers to public participation by  
8       the possibility of requiring written testimony  
9       ahead of time. Sometimes one doesn't have all of  
10      their comments together well enough to put them  
11      into written form, and then to be limited to that.

12             And also most particularly I would like  
13      to urge that you reconsider that individuals from  
14      your Commission decide whether the comments that  
15      might be made are relevant or not, or whether they  
16      would materially assist coming to a judgment.  
17      They probably wouldn't ever materially assist you,  
18      because they would slow things down.

19             And I think that the purpose of these  
20      changes is somewhat revealed by several uses of  
21      the word efficient here. Yes, of course you would  
22      like it to go faster, and I know that you're  
23      subject to a number of pressures. But I would  
24      like you to closely consider the inter-position of  
25      other barriers to public participation.



1 Thank you.

2 PRESIDING MEMBER LAURIE: Thank you very  
3 much. I would just note that I agree with your  
4 introductory comments, to wit, we are not elected  
5 officials, and therefore owe a greater obligation  
6 and sensitivity to the public by providing more  
7 than ample opportunity to participate.

8 Yes, sir.

9 MR. KELLY: Steven Kelly, Independent  
10 Energy Producers Association. We'll be providing  
11 more exhaustive written comments at the end of the  
12 week, but I did want to comment on this one  
13 section, section 1212.

14 My reading of this section suggests that  
15 the proposed changes appropriately provide the  
16 Presiding Member the authority to make things move  
17 more efficiently. There's the language speaks  
18 continually about how the Presiding Member may do  
19 something, it's never used the word shall.

20 And I think that describes a process  
21 that provides the Presiding Member the appropriate  
22 authority to move forward in a siting process.

23 We all know that these siting processes  
24 do not occur in a vacuum. There will be  
25 innumerable pressures and information passed to

1       you as they historically are through siting  
2       processes. It would be the Presiding Member's  
3       discretion to determine when best to move the  
4       process along and when it's best to slow it down.

5               And I think that's an appropriate role  
6       for a Presiding Member to take. And we find this  
7       section to be something that is going to be in the  
8       benefit of Californians in the long term as we  
9       move these, and improve the efficiency of the  
10      siting process.

11             So we urge you to move forward on this.  
12      Thank you.

13             PRESIDING MEMBER LAURIE: Thank you,  
14      sir.

15             COMMISSIONER PERNELL: Question.

16             PRESIDING MEMBER LAURIE: Mr. Kelly.

17             COMMISSIONER PERNELL: Do you agree with  
18      everything in the section? The proposed  
19      amendments?

20             MR. KELLY: The section that I'm looking  
21      for that --

22             COMMISSIONER PERNELL: I'm referring to  
23      (b), (c) and (e).

24             MR. KELLY: The places where it provides  
25      the opportunity under the language that says the

1       Presiding Member may, is something that we would  
2       accept.

3               COMMISSIONER PERNELL:  Is it your  
4       opinion that the Presiding Member have this  
5       discretion already?

6               MR. KELLY:  If he doesn't then we  
7       would -- we think that this makes some sense.  I  
8       think the language is being put in to clarify  
9       where there was some ambiguity in the past.

10              This explicitly is making clear the  
11       discretion that's being delegated through the  
12       rulemaking process I guess it would be, and  
13       comfortable with that.

14              COMMISSIONER PERNELL:  Okay.

15              MR. KELLY:  Okay.

16              MR. BURTON:  My name is John Burton and  
17       I'm a Sacramento resident.  I'm also an energy  
18       efficiency and solar energy consultant.

19              And I agree with the general spirit of  
20       all the public comment that we've heard this  
21       afternoon except for the previous speaker, Mr.  
22       Kelly, who I believe represents power plant  
23       producers that like to make money by building  
24       power plants.

25              PRESIDING MEMBER LAURIE:  Just get to

1 the point.

2 MR. BURTON: Yeah. The main thing that  
3 I would draw attention to is section 1212(c),  
4 exercise of discretion, which I believe that the  
5 existing language without any changes is much  
6 better and serves the public's interest.

7 Thank you.

8 PRESIDING MEMBER LAURIE: I'm sorry, say  
9 that again. Under (c).

10 MR. BURTON: I spent about an hour  
11 reading through all this material, so to the level  
12 that I understand it, we don't need these changes  
13 at all. And the existing regulations are much  
14 better. And this kind of discretion should not be  
15 given.

16 Thank you.

17 PRESIDING MEMBER LAURIE: Okay, thank  
18 you.

19 COMMISSIONER PERNELL: John, are you  
20 representing anyone, or just a private citizen?

21 MR. BURTON: That's right, I'm a member  
22 of the public.

23 COMMISSIONER PERNELL: Okay.

24 MR. BURTON: Thank you.

25 PRESIDING MEMBER LAURIE: Anybody else

1 on that section?

2 MS. MENDONCA: Commissioner Laurie, --  
3 oh, go ahead.

4 MR. CHAMBERLAIN: Bill Chamberlain,  
5 Chief Counsel. Just a couple of brief comments.

6 First of all I believe that subsection  
7 (e) simply reflects what's already in the law. In  
8 other words, I think that those provisions of the  
9 Government Code are already applicable to the  
10 Energy Commission.

11 We drafted this as more or less an  
12 encouragement to use those sections when it was  
13 appropriate to do so.

14 And the other comment that I would make  
15 in response to Ms. Simon's comments, is that I  
16 believe the second sentence in -- I'm sorry, the  
17 third sentence in subdivision (b) was intended  
18 appropriately to allow the Presiding Member to  
19 make a judgment when there really was no dispute  
20 of material facts.

21 She may have made a reasonable point  
22 that that could be difficult to do from written  
23 testimony alone. And so one possible response to  
24 that point would be to add the words, after  
25 "written testimony" you could add the words "and

1 prehearing conference statements indicate."

2 COMMISSIONER PERNELL: Say that again?

3 MR. CHAMBERLAIN: You could add the  
4 words, after "written testimony" "and prehearing  
5 conference statements" and then --

6 COMMISSIONER PERNELL: Okay.

7 MR. CHAMBERLAIN: -- make indicate  
8 into -- or instead of "indicates" it would be  
9 "indicate."

10 PRESIDING MEMBER LAURIE: Thank you,  
11 sir. Ms. Mendonca.

12 MS. MENDONCA: Commissioner Laurie, as  
13 the Public Adviser I really have two roles here  
14 today, so my hats are kind of juggling.

15 I did receive approximately 18 comments  
16 from members of the public which I packeted. It's  
17 been impossible, with the way that they've come  
18 in, to actually go through and sort out which  
19 specific sections people were responding to.

20 So I would like to, with regard to the  
21 later deadline, perhaps do a grid where I could  
22 give you a better layout of where the various  
23 comments from the public come in.

24 PRESIDING MEMBER LAURIE: I think that  
25 would be a good way to present it.

1 MS. MENDONCA: And the second part is  
2 that I did include in my regs, the Public Adviser  
3 does have a role of advising the Commission about  
4 what they maybe should and shouldn't be doing in  
5 the area of public participation.

6 And I am particularly troubled that in  
7 this particular section I haven't seen -- of  
8 course, I am not in your shoes or in your seat or  
9 under your cap as a decision-maker, but I have not  
10 seen that the process has been broken such that we  
11 need to fix it.

12 I believe quite strongly that current  
13 regulatory set-up gives the Presiding Member and  
14 the Presiding Committee the discretion needed to  
15 run a good hearing.

16 I get concerned when members of the  
17 public are told unless they have their prehearing  
18 conference statement with all the t's crossed and  
19 all the i's dotted that they would be precluded  
20 from bringing up issues, or being able to cross-  
21 examine, because oftentimes those hurdles are very  
22 difficult for lay members of the public.

23 PRESIDING MEMBER LAURIE: Okay.

24 MS. MENDONCA: Thank you.

25 PRESIDING MEMBER LAURIE: Mr. Ajlouny,

1 did you have an additional comment on this point?

2 MR. AJLOUNY: Yes, a few things, as  
3 people were talking, because this is a workshop I  
4 appreciate the opportunity to give some more  
5 feedback.

6 On one thing, and excuse me but I don't  
7 know the lady's name, the young lady here that you  
8 were talking to --

9 PRESIDING MEMBER LAURIE: Ms. Simon.

10 MR. AJLOUNY: What is it?

11 PRESIDING MEMBER LAURIE: Ms. Simon.

12 MR. AJLOUNY: Ms. Simon. You asked what  
13 other government agency could you do the same  
14 things pretty much as you can do for the CEC  
15 siting process of a power plant.

16 PRESIDING MEMBER LAURIE: No, that  
17 wasn't what I asked.

18 MR. AJLOUNY: Okay, well, you made a  
19 comment and the answer was really no other  
20 government agency allows for the things that we've  
21 been able to do in the process of cross-  
22 examination and things. You know me, I'm not  
23 great with my words.

24 The point I want to make is those  
25 agencies have people that you can lobby, you can



1 talk to, you can spend money, you can do whatever.  
2 You guys, you leave a phone mail, you won't call  
3 back.

4 So that's a very very different  
5 approach. It's almost like a courtroom. You  
6 don't ask the judge, hey, let's go out for dinner,  
7 let's talk about this murder case. Right?

8 (Laughter.)

9 MR. AJLOUNY: In the same token, it's  
10 almost -- you guys are like set in a position,  
11 from what I've learned in the last two years, and  
12 is that you have the extreme of City of San Jose  
13 and their government and city council and how they  
14 can change their mind on a dime.

15 And then you have a superior court judge  
16 who does things and has murder cases and rapes and  
17 things.

18 You're kind of sitting in the middle.  
19 But because we don't have that way of talking and  
20 influencing you, and all we do is have it by  
21 having these hearings. And so I think that's a  
22 big difference. And it was just to reflect back  
23 on when you guys had that conversation.

24 And then another gentleman talked about  
25 it's a burden to put testimony or comments or so

1 in written form. Now, you need to help me  
2 understand this. The way I understood this, and  
3 this whole process that I just went through the  
4 last two years, is comments are comments, but  
5 they're not testimony.

6 So if a person from the public wants to  
7 come out and feel better about saying what he  
8 wants to say, whether it's fact or not, it's a  
9 comment, and you don't use those comments really  
10 to give your PMPD, whatever, your decision. You  
11 don't use -- you use testimony under oath to make  
12 your decision.

13 PRESIDING MEMBER LAURIE: That is not  
14 correct. Public comment can be -- public comment  
15 is a part of the record, and it is the record that  
16 is utilized for the decision.

17 So, is public comment relevant to the  
18 decision? Yes, it is.

19 MR. AJLOUNY: Okay, then, well, it may  
20 be relevant, but in a number of cases, I know this  
21 came up in the meeting, it may be not as -- has  
22 the weight that written --

23 PRESIDING MEMBER LAURIE: No  
24 disagreement with that.

25 MR. AJLOUNY: Okay, good. See, you

1       helped me out, getting my point across.

2               So, just reflecting, again, the way I  
3       understood it and the way it was explained to me  
4       in every hearing is written testimony should be  
5       presented I think it was like a week or two before  
6       you come out to a hearing.

7               So everyone that had written testimony  
8       would present it by a ceratin date. That's, I  
9       think, why we had that prehearing conference.  
10       You'd have to present your testimony in writing.  
11       Okay.

12              So I don't understand this part that  
13       says all testimony offered by any party should be  
14       under oath. That's great. I mean, that's -- you  
15       know, you want people under -- but the Presiding  
16       Member, I think there's a problem here. Because I  
17       personally don't have a problem if you want to  
18       testify, to put it in writing, so everyone knows  
19       the ballgame you're playing and what everyone's  
20       thinking.

21              But the Presiding Member may encourage  
22       or require parties to present their testimony. I  
23       think personally, some people might be a little  
24       concerned about this, but if you're going to  
25       present testimony I think it's only fair to put it

1 in writing.

2 But to may encourage or require, that  
3 will allow something like that happened in our  
4 hearing when you have someone from the Bay Area  
5 Air Quality Management District show up and say  
6 here's some testimony that day in writing. And it  
7 was like a surprise thing to us.

8 So I think there's going to be trouble  
9 if you say may encourage. I'd ask that you strike  
10 that, and that anybody that wants to give  
11 testimony, and I mean testimony, not comments, but  
12 testimony in facts, put it in writing. And  
13 there's no leniency on may, you know, or  
14 encourage. Because it can cause problems because  
15 of the surprise.

16 And then the second sentence. I only  
17 see two sentences here, maybe I'm missing a  
18 period, but the second sentence, I ask that that  
19 whole section sentence be stricken, because it  
20 should be a fair process. Because you get written  
21 testimony, you read it, and then you have a chance  
22 to cross-examine and make your points.

23 And if someone's spending hours on that  
24 cross-examination or whatever, they might think  
25 it's important that you think it's a done deal, I

1 understand it. And that's where I have my  
2 problem.

3 And I think that's all of my comments,  
4 thank you.

5 PRESIDING MEMBER LAURIE: Thank you,  
6 sir. Anybody else on comments on 1212? Thank  
7 you.

8 Mr. Buell.

9 MR. BUELL: Yes, the next section of the  
10 regulations that was under consideration is  
11 section 1710 which deals with noticing  
12 requirements.

13 The initial draft of the regulations  
14 would modify section (a) and section (h) to  
15 liberalize the noticing requirements.

16 I'd like to point out that staff filed  
17 comments on July 13th, and we have been filing  
18 parties' comments as they've been received. So  
19 they are docketed and will be part of the record  
20 of this proceeding.

21 What I'd like to say regarding this  
22 section of the regulations is that staff believes  
23 that both 1718 and 1710 need to be modified. We  
24 have considered that there's been problems with  
25 the noticing, there being inconsistencies in the

1 different sections.

2 For example, 1710(h) has provided the  
3 opportunity for staff to meet with the applicant  
4 to exchange information and discuss procedural  
5 matters. Yet if I take a strict reading of  
6 section 1710(a) and parts of 1718, that isn't  
7 necessarily clear.

8 So we concur that it's an appropriate  
9 time to consider modifying these regulations.

10 We, however, believe that the staff  
11 holds a unique role in this process. We are here  
12 to try to represent the interests of the State of  
13 California, to provide the information to the  
14 decision-maker to make an informed decision.

15 And I think to maintain our role, our  
16 credibility with the members of the public as well  
17 as the Commissioners, certain types of meetings  
18 between staff and applicant, or staff and  
19 intervenors, need to be noticed.

20 And particularly, we believe those  
21 meetings on the staff analysis that generally the  
22 PSA or the preliminary staff assessment, would  
23 need to be noticed through public meetings.

24 We also believe that meetings where  
25 staff is negotiating with an applicant or an

1        intervenor a position on a particular issue should  
2        be noticed.

3                So, we've proposed regulation changes  
4        that are contained in our July 13th memo that  
5        addressed those points in both 1710 and 1718, to  
6        make those read consistently.

7                We also believe that the noticing or the  
8        requirement for staff to provide a report of  
9        conversation or a documentation of meetings that  
10       were not noticed as provided in the initial draft  
11       regulations presents a potential burden on staff.  
12       It's a lot of work to do those.

13               It has generally been staff's policy at  
14       anytime that we meet or have a conference call  
15       with an applicant or an intervenor to prepare  
16       those. They get done sometimes; and sometimes  
17       they don't.

18               Lastly, we have proposed a few other  
19       changes to those sections to try to clarify what  
20       we think is appropriate changes to the regulations  
21       at this time.

22               That's our comments. If you have any  
23       questions I'd be glad to try to explain staff's  
24       position further.

25               PRESIDING MEMBER LAURIE: Question.

1 Under sub (h).

2 MR. BUELL: Yes.

3 PRESIDING MEMBER LAURIE: "Nothing in  
4 this section shall prohibit an applicant or any  
5 other party from informally exchanging  
6 information." That's current language?

7 MR. BUELL: That's correct.

8 PRESIDING MEMBER LAURIE: And what does  
9 that mean, informally exchanging information?

10 MR. BUELL: Well, a number of times the  
11 staff would exchange information. For example,  
12 there may be a situation where one of our air  
13 quality staff people needs to know from a modeler  
14 that has conducted the modeling for the  
15 applicant's analysis, as to what switch he had  
16 turned on in the modeling analysis.

17 It would be cumbersome to notice that  
18 kind of a data request with an applicant. In the  
19 past what has happened is our technical expert has  
20 called their technical expert and found out, yes,  
21 indeed, they did turn on switch A that did such-  
22 and-such to the modeling analysis.

23 So that's kind of an example of that  
24 type of meeting that has taken place.

25 PRESIDING MEMBER LAURIE: And that's



1 permitted now?

2 MR. BUELL: That is permitted now,  
3 although it's unclear the way the regulations are  
4 written.

5 PRESIDING MEMBER LAURIE: That's my  
6 understanding.

7 MR. BUELL: Right.

8 PRESIDING MEMBER LAURIE: Okay.

9 COMMISSIONER PERNELL: Question. Under  
10 1710 is it staff's position that there -- first of  
11 all, there are only two areas (a), which is  
12 provided in subsection (h), and subsection (h)  
13 kind of outlines some additional criteria.

14 So my question is staff is opposed to  
15 subsection (h) as written?

16 MR. BUELL: Yes. We think that it  
17 provides -- or does not provide or require staff  
18 to notice certain types of meetings, as I  
19 indicated.

20 I believe the meetings where we're  
21 discussing specifically the staff's analysis or  
22 negotiating on substantive issues, or workshops  
23 that should be publicly noticed.

24 And so rather than try to play with the  
25 language of (h) to clarify that, we thought it was

1       most appropriate to clarify that in section (a),  
2       which dealt with the noticing requirements  
3       directly.

4               COMMISSIONER PERNELL:  Okay.  But from  
5       (b) to (g) we're not doing anything?  We're just  
6       leaving that as it is?

7               MR. BUELL:  Right.  Staff would propose  
8       some minor -- I call them minor modifications,  
9       perhaps the Committee would think differently, but  
10      some minor modifications to make the sections read  
11      consistently.

12              Section (d), we're proposing to modify  
13      that in perhaps a substantive way in that we would  
14      say that workshops sponsored by staff need only be  
15      signed off by the Executive Director, not by the  
16      Committee, which would be a change in policy.

17              COMMISSIONER PERNELL:  I'm not sure I  
18      agree with that.  But you'll have your day in  
19      court, I guess.

20              MR. BUELL:  That's right.

21              COMMISSIONER PERNELL:  Thank you.

22              PRESIDING MEMBER LAURIE:  Mr. Buell, the  
23      Committee hearing the case, and then the  
24      Commission is the decision-maker, is that correct?

25              MR. BUELL:  That's correct.

1                   PRESIDING MEMBER LAURIE: And it is the  
2                   responsibility of staff to offer their thoughts,  
3                   their recommendations, their testimony in a staff  
4                   report, is that right?

5                   MR. BUELL: That's correct.

6                   PRESIDING MEMBER LAURIE: What then is  
7                   the downside of allowing a free flow of  
8                   information and discussion, other than perception.

9                   Let's take perception off the table for  
10                  a moment. What's the downside?

11                  MR. BUELL: I think the downside is that  
12                  staff has a unique role in the process of trying  
13                  to address multiple issues, or make sure that the  
14                  Committee has information. And I think by not  
15                  having publicly noticed meetings we don't have a  
16                  complete picture on which to inform the Committee  
17                  of what those issues are.

18                  So, --

19                  PRESIDING MEMBER LAURIE: Well, I don't  
20                  think -- there's nothing in (h) that says you  
21                  shouldn't have public discussions. All (h) says  
22                  is that in addition to that you can have  
23                  discussions that are not public.

24                  So my question would be how is that,  
25                  again, other than perception, how is that

1       detrimental to the public?

2               Mr. Mundstock wishes to comment.

3               MR. MUNDSTOCK:  Commissioner, I would  
4       say, based on my 21 years of experience here that  
5       a noticed public workshop allows staff to hear  
6       from all the different parties in the case.

7               So if we notice an issue on water in a  
8       case where water is a significant issue, we have  
9       the various sides represented, in fact, everyone  
10      who thinks water is important.  So we can then get  
11      everything out on the table and try to make our  
12      own conclusions and our own proposals based upon a  
13      full deck of cards.

14              Under these proposed regulations staff  
15      would be permitted, if not encouraged, to go out  
16      and meet separately with one party or another,  
17      usually the applicant, and try to formulate its  
18      positions with the other parties absent.  And that  
19      actually would make the job harder for staff,  
20      because they would not have the availability of  
21      all the facts of the other positions.  And I think  
22      it's a detriment to staff's ability to do our job  
23      if we are given this option.

24              PRESIDING MEMBER LAURIE:  Is there  
25      anything in this section that inhibits or

1 prohibits staff's responsibility to hold public  
2 workshops?

3 MR. BUELL: I believe that the mere fact  
4 that we would not be required is a potential  
5 problem, in the fact that I think that we'd fall  
6 victim to trying to expedite the process.

7 It would be first we'll have one  
8 workshop; pretty soon there will be no workshops  
9 that staff would conduct --

10 PRESIDING MEMBER LAURIE: Well, how  
11 about if you were required to hold public  
12 workshops, if you don't want the discretion?

13 MR. BUELL: That's exactly why we  
14 proposed the language --

15 PRESIDING MEMBER LAURIE: It is not the  
16 intent of this language to substitute private  
17 meetings for public meetings. That certainly is  
18 not my intent.

19 So, if it's staff's feeling that there's  
20 a concern that private meetings might substitute  
21 for public meetings, if you think that's what the  
22 language says, well, then I'm concerned about  
23 that. Because that certainly is not anything that  
24 I want to do. I don't want to cut back on  
25 workshops if they're necessary.

1           MR. BUELL: I think we probably agree on  
2           that point. The language that we would propose to  
3           do that is what we have in our memo of the 13th.

4           PRESIDING MEMBER LAURIE: But at the  
5           same time your language would prohibit discussions  
6           outside of the workshops.

7           MR. BUELL: Not if they were to exchange  
8           information or to discuss procedural matters. The  
9           section (h) would still remain and allow staff to  
10          meet with the applicant or intervenor to discuss  
11          what the information on the case is, to understand  
12          what their position might be on an issue, but not  
13          to negotiate --

14          PRESIDING MEMBER LAURIE: But, Rick, as  
15          we've discussed, (h) is ambiguous and nobody in  
16          this room can tell us what it means because it is  
17          implemented on an ad hoc basis.

18          MR. BUELL: I believe that it makes a  
19          lot more sense when it's read with the section (a)  
20          that we have modified. Then it becomes useful.

21          PRESIDING MEMBER LAURIE: Okay.

22          MR. MUNDSTOCK: Furthermore, in practice  
23          I think staff very clearly understands what (h)  
24          means under the current regulation. I mean it is  
25          an exchange of preliminary information. It is

1       trying to get clear, you said this in one section  
2       of the AFC, you said that in another. Applicant,  
3       those are contradictory. Which did you mean?  
4       Have we lost this document? You know, do we have  
5       the right stuff in front of us?

6               I mean it's very clear preliminary  
7       nonsubstantive discussions which are necessary.  
8       This particular exception was written, this is for  
9       the convenience of staff, and we support it.

10              And I don't believe there's been any  
11       history of problems with use of that section as it  
12       currently exists.

13              PRESIDING MEMBER LAURIE: The question  
14       is to your (a). Except where the staff or a  
15       party, other than a governmental agency, wishes to  
16       negotiate with respect to one or more substantive  
17       issues, in which case it would have to be noticed.

18              How would you apply the term negotiate  
19       with respect to one or more substantive issues?  
20       I'm not sure I understand what that would mean.

21              For example, let's say you had a noise  
22       issue, a traffic issue, doesn't matter. What  
23       would the negotiation be over? A correct fact, a  
24       proposed condition? What do you think would fall  
25       under that verbiage?

1                   MR. BUELL: I believe there's two things  
2                   that could fall underneath that. The one that you  
3                   mentioned is a proposed condition of certification  
4                   where we're essentially negotiating the verbiage  
5                   of what needs to apply and what timeframes.

6                   The second would be a mitigation, what  
7                   is an appropriate mitigation. For example,  
8                   whether once-through cooling or dry cooling, or  
9                   what dry cooling systems might be the best  
10                  mitigation. That would be an opportunity for  
11                  parties to discuss what their position is on what  
12                  is the most advantageous mitigation for a  
13                  particular technical area. And discuss the  
14                  details of that. Is it a size A or size B type  
15                  device.

16                 PRESIDING MEMBER LAURIE: Let's say  
17                 there's a, in your preliminary staff assessment,  
18                 you're looking at noise monitoring systems. And  
19                 it's your thought that there should be eight noise  
20                 monitoring stations. And the applicant gets that  
21                 and goes, no, no, no, I think they misunderstand  
22                 because there's going to be a giant wall here,  
23                 therefore everything to the west is irrelevant.

24                 And they want to come to you and say,  
25                 Mr. Buell, you know, I'm not sure that you've read



1       this right, because you really don't have to pay  
2       attention to what's on the west because there's  
3       going to be a giant wall there, et cetera, et  
4       cetera. And you go, oh, yeah, I guess that's  
5       right.

6                   Is that a negotiation? Is that  
7       something that you feel is not safe to be  
8       discussed in public? What's the harm there? All  
9       of which, by the way, would be subject to public  
10      scrutiny.

11                   MR. BUELL: I think in the example that  
12      you gave, and I think Dave said that was  
13      negotiations, for the record. I said that that  
14      wouldn't be. But, so I think there's obviously  
15      some reading of what these regulations say to mean  
16      understand that.

17                   But if it's simply to clarify a position  
18      I think that the applicant should be allowed to  
19      get on the phone and tell me that there's no  
20      reason for us to have monitors on the west side  
21      because there's no residences.

22                   Likewise, I think, though, that quite  
23      often the public can add a great deal to such  
24      discussions. And as has happened in the past is  
25      they've been able to identify that yes, indeed,

1       there are residences on the west side of the power  
2       plant site that weren't known to staff or to the  
3       applicant.

4               So, there's a tradeoff here that I think  
5       we need to be aware of is that quite often the  
6       public does have something to add to the  
7       discussions.

8               PRESIDING MEMBER LAURIE: But if, let's  
9       say your initial thought was we need eight  
10      stations, and then on second thought you go, no, I  
11      think that's right, I think we really only need  
12      five. And that's subject to public scrutiny. Is  
13      public harm done by that?

14              MR. BUELL: I would think that the  
15      public wouldn't be harmed by that. But I would  
16      also think that there's a danger that the public,  
17      being cut out of that discussion, that they do at  
18      times have things to add to the discussion.

19              I can name one instance when we were  
20      discussing well mitigation on the Three Mountain  
21      case where one of the local landowners provided a  
22      great deal of input to the potential impacts that  
23      we were discussing under well mitigation.

24              And his point of view was that we had  
25      been, up to that point in time, thinking about

1       electrical charges due to pumping groundwater and  
2       the impacts on that. And he pointed out that he  
3       doesn't use electricity to pump his water, but he  
4       uses diesel.

5               And I think it's that type of input that  
6       helps staff write a condition that addresses all  
7       the nuances that might be in mitigation.

8               Certainly there's times when I'm going  
9       from four noise monitors to three, and it makes  
10      perfectly good sense for the applicant to get on  
11      the horn and say, you know, that costs us \$10  
12      million to do that fourth one. I'm exaggerating,  
13      but, do you really think we need it. And I think  
14      staff can take that type of comment.

15              Certainly nothing prohibits an applicant  
16      from filing written comments to that effect, too,  
17      that would be part of the record. That all other  
18      parties would know what the implications of their  
19      concerns were.

20              PRESIDING MEMBER LAURIE: Okay, thank  
21      you, sir. Commissioner Pernell, did you have any  
22      questions at this point?

23              COMMISSIONER PERNELL: None other than  
24      just a clarification to staff. If there is a  
25      misunderstanding of some documents can't you then

1 call the applicant and clear that up on the phone,  
2 as long as you're not negotiating any substantive  
3 change of the application?

4 MR. MUNDSTOCK: Commissioner, the answer  
5 is absolutely yes under the existing regulation,  
6 and that is what is now done. And this is --

7 PRESIDING MEMBER LAURIE: Well, Mr.  
8 Mundstock, --

9 MR. MUNDSTOCK: -- primarily in the  
10 early stage of the case --

11 PRESIDING MEMBER LAURIE: -- let me take  
12 issue with you because for the last three years we  
13 have debated this language. And I can assure you,  
14 I don't know how many of those meetings you  
15 attended, I think many, but I assure you between  
16 the General Counsel's office, the Hearing office  
17 and siting staff, there is no consensus as to the  
18 correctness of your answer.

19 Thirty percent would say yes, 30 percent  
20 would say no, and another 40 percent would say  
21 depends on the circumstances. That's what I've  
22 gotten over the last three years that we've been  
23 discussing this section.

24 MR. BUELL: I have to concur with you  
25 that there's been various, from project manager to

1 project manager, different interpretations of  
2 that. And some meetings have been noticed, where  
3 others have not been, based upon the same section  
4 of the regulations.

5 That's why I think, as I opened this  
6 discussion, we agree -- staff agrees that there is  
7 some clarification of both 1710 and 1718 need to  
8 be clarified on exactly what meetings need to be  
9 noticed.

10 COMMISSIONER PERNELL: That's all I  
11 have.

12 PRESIDING MEMBER LAURIE: Members of the  
13 audience, Mr. Kohn, we're going to let the  
14 gentleman sitting at the table go first since they  
15 got their places by getting here early, I think.  
16 Mr. Joseph.

17 MR. JOSEPH: Thank you, Commissioner.  
18 Marc Joseph again for CURE.

19 Commissioner Laurie, you wanted to put  
20 perception aside for a minute; I want to start  
21 with perception.

22 In the last year, year and a half, this  
23 Commission has responded heroically to the demands  
24 put on it to say yes to power plants as quickly as  
25 possible. It's put an enormous burden --

1                   COMMISSIONER PERNELL: Well, I'm not  
2                   sure that that was a demand put on us. We looked  
3                   at ways to expedite the siting process, and do it  
4                   in an environmentally friendly way. So I'm not  
5                   sure that a demand to license as soon as possible  
6                   was ever put on us, certainly not this Committee.

7                   MR. JOSEPH: I accept that  
8                   clarification.

9                   COMMISSIONER PERNELL: Thank you.

10                  MR. JOSEPH: Gladly, because I think you  
11                  have, to the greatest extent possible, and your  
12                  staff has, to the greatest extent possible,  
13                  attempted to protect the environment while making  
14                  decisions at a pace which are historically  
15                  unprecedented.

16                  And because you've had these sometimes  
17                  conflicting needs to both expedite and thoroughly  
18                  examine the issues, there is a risk that things  
19                  will be overlooked.

20                  And one of the things at risk when the  
21                  Commission is operating at its maximum capacity,  
22                  as it has done in the last year, year and a half,  
23                  is the risk to public confidence in the decision  
24                  making.

25                  And I think it there is a single element

1       which puts at risk the confidence in this  
2       Commission most is the ability to have secret  
3       meetings which are not now permissible.

4               One of the things that speaks best about  
5       the Commission process is its visibility; that  
6       people can see and interact with the staff as they  
7       are evaluating the project.

8               Switch to reality now. Commissioner  
9       Laurie, it is true the staff is not the decision  
10      maker. The staff does, however, have explicit  
11      requirements in your regulations for its staff  
12      assessment. And as a matter of practicality that  
13      we are all aware of, most issues in most cases get  
14      resolved by the staff and are accepted by the  
15      Commissioners. That's one of their functions is  
16      to weed through it and leave for you only, you  
17      know, the remaining controversial issues.

18              You should be entitled to rely on your  
19      staff to resolve most of the issues in the case.  
20      It would not be humanly possible for it to be any  
21      other way for you.

22              PRESIDING MEMBER LAURIE: Okay, let me  
23      make inquiry with you about that point. Let's say  
24      Mr. Buell says I want eight noise monitoring  
25      stations. Gets a call from the applicant and

1       says, no, putting up a wall to the west,  
2       unnecessary. Mr. Buell says, yeah, that's right,  
3       so I think I'm going to recommend five. And that  
4       goes out to a public workshop, or goes out to a  
5       public hearing, let's say both.

6               Members of the public come in and say,  
7       no, you need eight, because yeah, you're going to  
8       put up a wall, but because of air flow, yada yada  
9       yada, you need eight.

10              So then that's the information that  
11       flows either back to staff or to the Commission.  
12       Thus where does the harm arise?

13              MR. JOSEPH: The answer is in human  
14       nature. When any person expresses an opinion  
15       publicly and in a written document, and then is  
16       asked to change that opinion, it's a harder step  
17       to make, than if a person has not already  
18       expressed the opinion.

19              Once a person is committed to a position  
20       it's harder to change that person's mind no matter  
21       the merits. That's the harm.

22              Now, I agree with you the regulation is  
23       not now a model of clarity. And there are clearly  
24       uncertainties as to how to apply the current  
25       regulation.



1                   PRESIDING MEMBER LAURIE: Okay, well,  
2                   then let's use the counter argument. Let's say  
3                   the correct answer is five and not eight. So Mr.  
4                   Buell puts out eight, is not allowed to get the  
5                   data that it's really five. So then why is that  
6                   better when the correct answer is really five and  
7                   not eight?

8                   MR. JOSEPH: Mr. Buell is allowed to get  
9                   the data, but he should get it at the time when  
10                  he's saying is it five or eight, and everybody  
11                  gets to answer that question and give their  
12                  opinion at the same time.

13                 MR. BUELL: Commissioner Laurie, if I  
14                 might interject here. One of the things that did  
15                 occur to me is the advantage of doing it one way  
16                 versus another is that if I allow for such  
17                 meetings to take place outside of a publicly  
18                 noticed workshop, then it becomes the decision  
19                 maker, you, that ends up having to hear all the  
20                 evidence on that issue and making a decision.

21                 If I allow the parties to meet in an  
22                 open forum and exchange ideas perhaps I'll resolve  
23                 the issue, whether it is eight or five is the  
24                 correct answer, at a public workshop. And I'll  
25                 save you, the decision maker, that time in

1       evidentiary hearings on hearing that evidence.

2                   And so it is a matter of efficiency in  
3       some respects.

4                   PRESIDING MEMBER LAURIE:  It's not the  
5       intent of this regulation to inhibit public  
6       workshops.  It's to add to staff's information  
7       data.  Information data?  Doesn't matter.

8                   MR. JOSEPH:  I think, you know, as I'm  
9       sitting here a thought occurs to me as a possible  
10      way to increase the information flow to the staff  
11      on the kinds of questions which have been raised  
12      here in a way which allows public transparency to  
13      the process.

14                  And the answer might be email.  To use  
15      Mr. Mundstock's example.  If the air quality  
16      modeler at the Commission wants to find out  
17      whether switch A was on or off in some model, do  
18      it by an email, copy to the service list, and  
19      everybody can see it, they watch it, they say,  
20      okay, I don't need to say anything about that, let  
21      it go by.

22                  And everybody knows what's going on.  
23      And people can decide for themselves whether it's  
24      something they want to voice an opinion on.

25                  Now, I'm not suggesting that, you know,

1       an email exchange can take the place of workshops,  
2       because it's not the same. But there's a level of  
3       inquiry, this information flow that you're looking  
4       for, which perhaps can be done in a visible way  
5       which is not visible with a telephone call.

6               COMMISSIONER PERNELL: And would that  
7       increase the workload of staff even to that  
8       extent. You mentioned earlier about the section  
9       where you write up a document describing what the  
10      negotiation was and send that out. What is  
11      different between that and what is being proposed  
12      now?

13             MR. BUELL: I think the difference is  
14      the act of doing it, is that the email, itself,  
15      becomes the document I docket. And then I don't  
16      have to spend the time drafting a report of  
17      conversation which may be multiple pages on the  
18      topic. Because all the information or the  
19      question that was being asked and the answer to  
20      that would be contained in the email.

21             That is an efficient way. I've done  
22      that, myself, as a project manager, is to file  
23      those emails.

24             COMMISSIONER PERNELL: So you're not  
25      opposed to that recommendation?

1                   MR. BUELL: I'm not opposed to that,  
2                   although I'm not sure that we're ready to require  
3                   everyone to file every question they might have  
4                   via email, either, so.

5                   MR. JOSEPH: And I'm less concerned  
6                   about it being filed if I've gotten a copy of it  
7                   as it happens. That's sort of automatic noticing.

8                   I'd like to address just one other  
9                   aspect of this what I refer to as secret meeting  
10                  section here. In the first extraordinary session  
11                  of the Legislature this year, in SB-28X, the  
12                  Legislature explicitly considered amendments to  
13                  the Warren Alquist Act which would have exactly  
14                  the same effect as are proposed here.

15                  And that proposal was in several  
16                  iterations of the bill. The Legislature  
17                  ultimately decided to delete that provision. And  
18                  I think it's appropriate for the Commission to  
19                  take cognizance of that act of the Legislature and  
20                  not act where the Legislature decided not to act.

21                  PRESIDING MEMBER LAURIE: Perhaps the  
22                  Legislature acted in recognition of our regulatory  
23                  authority.

24                  MR. JOSEPH: One can see that they  
25                  recognized the -- regulatory authority; one can

1       also see that this was an issue that there was not  
2       consensus among the Legislature as to how to  
3       proceed here.

4               And, in fact, there was very substantial  
5       disagreement about how to proceed here. And I  
6       think it suggests the Commission should tread  
7       carefully in going exactly where the Legislature  
8       decided not to go.

9               PRESIDING MEMBER LAURIE: Okay, thank  
10      you, sir. Mr. Ajlouny.

11              MR. AJLOUNY: Yes. Go ahead, go for it.

12              MR. JOSEPH: Thank you. One more  
13      thought before I leave it. And that's the staff's  
14      proposed regulation here.

15              You explored this some, Commissioner  
16      Laurie. The word negotiate can be construed as a  
17      very narrow word. I would say that any  
18      formulation of this should focus on discussion of  
19      substantive issues, because I'm not sure what a  
20      negotiation is.

21              Negotiation suggests an adversarial  
22      process which --

23              PRESIDING MEMBER LAURIE: Yeah, I --

24              MR. JOSEPH: -- it may not be.

25              PRESIDING MEMBER LAURIE: -- I

1 understand.

2 MR. AJLOUNY: Okay, Issa Ajlouny. In  
3 section 1710(a) I admit there's, being part of the  
4 process for two years, that there's too much of a  
5 gray area for, go with the scenario of noise and  
6 how many sensors, too much of a gray area that a  
7 staff person might feel they can call the  
8 applicant, or maybe the applicant on the phone  
9 with their consultant, and then discuss sensors,  
10 and you know, just get into a discussion.

11 And then that might lead to follow-on  
12 with the next month of well, you know, if you  
13 don't want to do eight sensors, we can go with  
14 six, you know. That maybe is the negotiations.

15 It leaves room. So I agree that these  
16 rules need to be precise. And no room for  
17 interpretation. So I am definitely a believer in  
18 that. Because I can say, for whatever you have  
19 written down, and I didn't study this until the  
20 last few weeks.

21 What's happening today, from what I've  
22 experienced and the documents that I've read in  
23 the docket log is you have conference calls  
24 excluding the public and negotiating where noise  
25 levels should be, and whether air conditioning or

1 windows, you know. Those things are documented in  
2 our case that we are dealing with that those are  
3 going on today.

4 And I feel, as being part of the  
5 process, I don't think, Commissioners, you want  
6 that kind of maybe conference calls going on. But  
7 that has happened. So we need to make it clear.

8 And my solution was just like Mr. Joseph  
9 said --

10 PRESIDING MEMBER LAURIE: And why do you  
11 think that that's bad? If those conversations are  
12 then subject to public scrutiny?

13 MR. AJLOUNY: If you really -- let me  
14 explain it, I will answer that question. But it's  
15 sensitive information, I don't want to be cut off.  
16 But I'll tell you exactly why that's bad. Because  
17 it's true life.

18 You have a conference call with staff,  
19 with the applicant for Metcalf, and their  
20 consultants, talking about noise.

21 PRESIDING MEMBER LAURIE: We're not --

22 MR. AJLOUNY: Well, you asked me the  
23 danger.

24 PRESIDING MEMBER LAURIE: -- going to  
25 talk about case specifics while the case is

1 pending.

2 MR. AJLOUNY: Well, see.

3 PRESIDING MEMBER LAURIE: You can talk  
4 about generalizations without making reference to  
5 a specific case.

6 MR. AJLOUNY: Okay. In what I call  
7 pride or the nature of a human being is when you  
8 take a position and a position is taken in  
9 private, and that position is being manipulated  
10 between staff, staff management, staff lawyers,  
11 applicant, their consultants.

12 And if that can be done all behind the  
13 scenes and maybe let's say, for instance a staff  
14 person with the CEC, hypothetically, really felt  
15 strong about a certain dB level of sound. And he  
16 didn't agree, because of his experience in the  
17 last 17 years.

18 Well, it's easy to push someone like  
19 that out the door, manipulate him by looking over  
20 his pc for the last 17 years, seeing what  
21 documents are there, -- and basically maybe push a  
22 guy out the door feeling very uncomfortable to  
23 come to work.

24 The public wouldn't know that. And then  
25 what we see at the workshop is well, we think that



1       it's okay to put air conditioning in a window  
2       instead of making the source quieter. The  
3       perception, you know, or not the perception of we  
4       feel we were cheated or didn't have part of the  
5       process, but the danger in that is what really  
6       happened is a hundred percent different.

7               And that, you don't have to agree with  
8       that, but that's fine. But the solution,  
9       Commissioners, is what Mr. Joseph mentioned, and  
10      that's exactly being an IT specialist, the  
11      technology out there today is terrific. I mean  
12      there's discussion databases where anytime you can  
13      see someone ask a question, someone else  
14      responding, and everyone looking at everyone.  
15      It's just a database flowing. It's an easy thing  
16      to do. And anyone that wants to go look at it,  
17      looks at it if they wanted to.

18             At the same time if someone wanted to  
19      ask a question or whatever they want to do, by  
20      changing (h) to saying only by email or in  
21      workshops or whatever, that would make it precise.  
22      That would be not prohibiting any time schedule  
23      or -- as a matter of fact it would be shorter on  
24      time.

25             You know how long it is to get on

1 conference calls. You get a blast of email and  
2 list ten questions and cc a nickname file that  
3 blasts to all the intervenors, and it's done. And  
4 then when they respond, they cc the -- it's an  
5 easy thing to do and it's public and there's no  
6 harm. And it would expedite the process as far as  
7 now you're not going to spend a week to get  
8 someone all available on a conference call.

9 So, I second the motion on the floor --  
10 no, I'm just kidding -- I second that. I think  
11 that's the solution.

12 COMMISSIONER PERNELL: I have a couple  
13 of questions. The email was just a suggestion,  
14 but my question to you is are you in favor of some  
15 amended version of (h)?

16 MR. AJLOUNY: Yes, just basically the  
17 reason I'm for it is because right now it's so  
18 vague I feel that some players are stretching the  
19 rules.

20 So I'm in for (h), you know, keep (a)  
21 saying exception provided in section (h). And  
22 then in (h) only conversations, whatever, are  
23 either public or emailed. I mean that's my words,  
24 I'm not a lawyer, but bottomline is you can't be  
25 picking up the phone and negotiating or talking or

1       even asking the question.  There's no reason why  
2       you can't just blast an email in today's  
3       technology.

4               COMMISSIONER PERNELL:  Okay, and I would  
5       just state for the record that everyone is not  
6       privy to email.  So you got some retired folks,  
7       little mom and pops out there that don't have  
8       email.

9               So, I'm not opposed to that, but we  
10       should, when we're doing this, keep in mind that  
11       we want to include everyone and not exclude  
12       anyone.

13              MR. AJLOUNY:  To comment on that, I was  
14       so excited about the email.  On a monthly basis,  
15       or by the traffic of what kind of emails, you  
16       print those out and give it to the people that are  
17       intervening that don't have email and they get  
18       sent once a month or once every two -- whatever's,  
19       you know, appropriate.

20              COMMISSIONER PERNELL:  Right, we can  
21       have some type of other network mechanism, but we  
22       can't leave that off.

23              MR. AJLOUNY:  Yes, and that's a good  
24       point.

25              COMMISSIONER PERNELL:  Okay.

1                   PRESIDING MEMBER LAURIE:   Okay.  Mr.  
2           Kohn.

3                   MR. KOHN:  Thank you, Commissioner  
4           Laurie, Commissioner Pernell, pleasure to be here.  
5           I did want to comment on this particular section.

6                   This issue on 1710's been going around  
7           for awhile.  I recall when I first started working  
8           on siting cases 20-some-odd years ago, we had this  
9           issue.  So I guess some issues just never quite go  
10          away.

11                   And I applaud your efforts to try to  
12          clarify that because as you've tried to clarify  
13          with some of your questions, we need to really be  
14          careful about what the evil is that we're trying  
15          to prevent here.  And I don't think it's exchange  
16          of information.

17                   The concern that people have, and  
18          rightly so, is that decisions not get made without  
19          the public involvement.  And I think that's  
20          important.  I should probably speak in putting  
21          things on the record, say that I'm here  
22          representing the Sacramento Municipal Utility  
23          District.

24                   PRESIDING MEMBER LAURIE:  Okay, can I  
25          ask you a question about your last statement.

1       When you say decisions should not be made, which  
2       decisions?

3               MR. KOHN: Well, I'm referring to the  
4       Commission, and that's why I wanted to clarify  
5       that staff is not the decision maker. So we need  
6       to be careful. This is not an ex parte rule that  
7       we're talking about. Ex parte rules refer to  
8       communications with the decision maker, the  
9       Commissioners, Advisors to the Commission, Hearing  
10      Officers and so on.

11              Nonetheless, I think, as has been  
12      pointed out, staff does have a key role. We just  
13      shouldn't mix and match the terms ex parte contact  
14      with what we're talking about here. This is not  
15      ex parte. This is one party talking to another,  
16      but we need to recognize the importance that staff  
17      plays. That they are a very unique party. And  
18      that it would be natural for the Commission to  
19      rely on the expertise of its own party, although  
20      in concert with the entire record, of course, and  
21      comments from others.

22              PRESIDING MEMBER LAURIE: How does SMUD  
23      or the City of Sacramento address similar  
24      questions, similar procedural questions?

25              MR. KOHN: Well, in SMUD's case we

1       really don't do much in the way of formal  
2       evidentiary type hearings.  So, we're probably  
3       more on the very informal side when it comes to  
4       public input.  Although we try to maximize public  
5       input.

6               For example, on rates we have an  
7       advisory committee that makes recommendations to  
8       the staff and to the board.  But we certainly  
9       don't have rights of cross-examination or any of  
10      that.

11             So, obviously staff can -- maybe it's  
12      not obvious, but staff at SMUD can talk to anybody  
13      it needs to before it makes a recommendation to  
14      the board.  There's no limits placed on staff's  
15      ability to communicate with the public.

16             In terms of the City it's pretty much  
17      the same way.  There are occasional adjudicatory  
18      hearings before any local body.  But in most cases  
19      that I'm aware of, certainly the City of  
20      Sacramento, there's no constraints placed where  
21      the staff cannot speak to another party without  
22      having a publicly noticed meeting.

23             But, you know, that only speaks to part  
24      of the issue.  The other part of the issue is how  
25      do you insure that the public is involved and can

1 work with staff and other parties.

2 And I think your proposal doesn't in any  
3 way prevent that, but one thing I would agree with  
4 staff's comments, your proposed 1710(h) would  
5 require staff to make a written record of every  
6 communication. I think we might want to limit  
7 that to a record of any substantive communication.  
8 Because I think there's still going to be the  
9 occasional, or more than occasional times that  
10 staff speaks to any party on a purely procedural  
11 or nonsubstantive matter, clarifying what was  
12 meant in a particular data request or so on, where  
13 it may not be necessary to put that in writing.

14 But, I think on the other hand your  
15 proposal that staff be allowed to have even  
16 substantive communications, I think is  
17 appropriate, as long as the substantive  
18 communications do need to be recorded. And I  
19 think whether it's email or in writing, what-have-  
20 you.

21 The email suggestion is a good one, but  
22 as Commissioner Pernel correctly points out, we  
23 have to be very careful about trying to codify one  
24 particular technology when not everyone in the  
25 public is necessarily going to be using that

1       technology.

2               And while for most people email would  
3       work, there are others that it would not. And  
4       therefore, making it in writing, a copy of the  
5       email, or even just a separate written  
6       documentation would be appropriate.

7               So, I guess what I'm getting at is I  
8       think combining your proposal, in other words,  
9       allowing even substantive communications to be  
10      made between staff and other parties is  
11      appropriate as long as records are made of that.

12              And then there's oversight because  
13      either another party, a member of the public, or  
14      the Committee could say, you know, it seems  
15      there's too much going on here of substance in  
16      these phone calls or conferences. Maybe you need  
17      to have a workshop on this. If staff or the  
18      applicant get carried away.

19              But on the other hand I think staff's  
20      suggestion that only substantive communications  
21      should be recorded is probably appropriate,  
22      because there are many times where just a  
23      clarification would just, it would clutter the  
24      record just to try and put every one of those in  
25      writing.



1                   So, that's basically the gist of our  
2       comments.

3                   PRESIDING MEMBER LAURIE:   Thank you,  
4       sir.

5                   MR. KOHN:   Thank you.

6                   COMMISSIONER PERNELL:   All right, Steve,  
7       I need to ask you a question here, press you for a  
8       position.

9                   MR. KOHN:   Yeah, sure.

10                  COMMISSIONER PERNELL:   So what I think  
11       I'm hearing you say is that you're fine with (h)  
12       with some amendments.   Because we seem to be  
13       having a problem with (h) and I'm just trying to  
14       get everybody's opinion there.   So you're fine  
15       with (h) with some amendments?

16                  MR. KOHN:   That's right, that's right.  
17       And --

18                  COMMISSIONER PERNELL:   Are you going to  
19       submit any?

20                  MR. KOHN:   -- I'll try to submit some in  
21       writing.   I think it's July 30th the deadline, get  
22       you some specific wording.   But I think you could  
23       take your proposed revision to (h) and just add  
24       some wording to clarify that the record that would  
25       need to be made would be only for substantive

1       discussions, and not for purely procedural or  
2       informational.

3               COMMISSIONER PERNELL:   Okay.

4               MR. KOHN:   All right?

5               PRESIDING MEMBER LAURIE:   Thank you,  
6       sir.

7               MR. KOHN:   Thank you.

8               COMMISSIONER PERNELL:   Thank you, Steve.

9               PRESIDING MEMBER LAURIE:   Anybody else  
10       in the audience?   Mr. Kelly.

11               MR. KELLY:   Steven Kelly with the  
12       Independent Energy Producers.   I guess I share  
13       some of the comments just made.   I look at section  
14       (h), and my comments will go specifically to  
15       section (h) as a complement, not a substitute, for  
16       the data collection and public awareness  
17       regulations that you have today that are before  
18       staff.

19               And therefore I look at it as an  
20       enhancement to the existing process, to be able to  
21       provide an opportunity for staff to communicate,  
22       collect information and so forth, in a process  
23       that is less formalized.

24               Regarding this provision, though, that  
25       speaks to staff making a record, I can foresee in

1 the future where that will become very cumbersome,  
2 depending on how it's described, or what the  
3 requirements are, because what will happen is  
4 something that staff writes is deemed to be,  
5 quote, "a record of some meeting that has occurred  
6 or some conversation that has occurred" and then  
7 we're going to get competing interpretations of  
8 that, quote, "meeting" as a record for the public  
9 record.

10 My own sense in this is that the staff,  
11 which as I've heard here, have been here for a  
12 number of years working on these kinds of  
13 processes and problems. And are very well  
14 experienced in knowing the difference when there's  
15 a substantive matter or just a conversation going  
16 on.

17 And there seems to be either email or  
18 notice in the public record that would suggest  
19 that if they want to raise an issue that has come  
20 before them through these discussions, if they  
21 warrant a public workshop or some other process  
22 for bringing competing ideas to the table, they  
23 certainly have the opportunity to do that. And  
24 I'd encourage them to do that, through a workshop  
25 or through an email that raises the issue or

1       whatever.

2               But the problem still arises about what  
3       it is, if they're drafting a comment through  
4       email, is it a record of a conversation, or is it  
5       a statement of an issue that has come to their  
6       attention.

7               And I think it needs to be more of a  
8       statement of an issue that comes to their  
9       attention so we don't get competing litigation  
10      about, quote, "the record".

11              And I will just reiterate a concern  
12      that's already been expressed by, I think, most  
13      people here, that the definition of negotiation  
14      that was in the staff language under section (a)  
15      is terribly ambiguous, and either needs to be very  
16      much tightened up or removed. I can't identify  
17      what is a negotiation and what isn't.

18              And that doesn't solve the problem that  
19      I think we're trying to deal with.

20              So those are my comments on section (h).

21              PRESIDING MEMBER LAURIE: Thank you,  
22      sir.

23              COMMISSIONER PERNELL: Steve, I think  
24      you bring up a good point that in terms of a  
25      written record of conversation, and if there's a

1       dispute of the outcome of that conversation what  
2       happens? I mean who -- the Commission has their  
3       staff interpretation of the outcome, and it might  
4       be an intervenor or applicant have a different  
5       interpretation.

6                So that's something that clearly we got  
7       to think about. But I think it's a good point.

8                MR. KELLY: Thank you.

9                PRESIDING MEMBER LAURIE: Members of the  
10       audience on 1710. Yes, Ms. Simon.

11               MS. SIMON: Thank you. Anne Simon,  
12       Communities for a Better Environment.

13               We share a number of the reservations  
14       that have been identified. I think that the  
15       proposed language goes too far in trying to  
16       resolve the ambiguity, and differences in practice  
17       that occur under the existing regulation by taking  
18       off all regulation of communications functionally  
19       between the staff and the applicant.

20               And the subsequent written record  
21       doesn't solve the problem from the point of view  
22       of intervenors. Many intervenors have the  
23       experience of significant parts of proposed  
24       projects becoming moving targets from one publicly  
25       noticed event to the next. Coming to a workshop

1 thinking you were going to talk about a project  
2 that uses cooling system X to follow up Mr.  
3 Buell's example, only to discover that as a result  
4 of conversations between the staff and the  
5 applicant, the applicant is now proposing to use  
6 cooling system Y.

7 It's that transition out of the public  
8 view that's the problem that we think subsection  
9 (h) should be addressing.

10 A note of the conversation after it  
11 occurs placed in the docket is not going to solve  
12 that problem. It's the re-design or re-  
13 organization of the project or publicly presented  
14 proposals previously in private between the  
15 applicant and the staff that creates, I think, the  
16 most significant problems both for intervenors,  
17 and certainly for just unorganized members of the  
18 general public.

19 I think what Mr. Joseph's, you know,  
20 thought about email was related, or at least I  
21 relate it to the ability at least of people on  
22 email, which I think Commissioner Pernell makes  
23 the right point about, to catch up with this  
24 before it happens as it's happening.

25 I don't think that creating a hundred

1 million emails is actually the right thing to do.  
2 I do think that it would be useful to try to  
3 rewrite the section to preserve what staff thinks  
4 it's now doing, which we didn't understand till we  
5 came here. So I don't have anything available.  
6 But to try to rewrite the section so that an  
7 applicant is not prohibited from informally  
8 responding to specific inquiry from staff designed  
9 to clarify ambiguity about information that has  
10 previously been presented or something like that.

11 Rather than opening it up to say anybody  
12 can talk in private to anybody else about  
13 anything, which is what the redraft of section (h)  
14 does. There is no possibility of policing that.  
15 There is no possibility of any party who is not a  
16 party to the conversation knowing whether the  
17 written record is actually accurate.

18 And we thus then have an entire new  
19 level of question about the reliability of the  
20 information that's coming to members of the public  
21 interposed completely unnecessarily because the  
22 vice is not the written record or lack of it, the  
23 vice is the private discussion. And that's what  
24 should be addressed.

25 PRESIDING MEMBER LAURIE: You've

1 indicated that your organization does make  
2 appearances or have interests with local  
3 government. How do they handle the issue with  
4 local government where there is generally  
5 unrestricted access to staff?

6 MS. SIMON: Badly, I think. I think  
7 that many local government processes do not serve  
8 the interests of the public well. As, I forget,  
9 Mr. Ajlouny maybe said earlier, you know, the  
10 Energy Commission should not be equalizing down  
11 here if there's a perceived problem.

12 The low standard of many local  
13 government processes in terms of availability to  
14 the public, transparency to the public and ability  
15 to avoid backroom deals is not a standard that CBE  
16 thinks this Commission ought to aspire to.

17 PRESIDING MEMBER LAURIE: Okay.

18 COMMISSIONER PERNELL: Ms. Simon, in  
19 your interpretation, and you've been involved in  
20 our process over the years, the last couple of  
21 years at least since I've been here. How do you  
22 think this works now? Is it working, in your  
23 opinion?

24 MS. SIMON: I think that it is spotty.  
25 And I do agree with the impulse to try to get a



1 more uniform management of staff interactions with  
2 parties, because I think it isn't uniform.

3 It is our experience that staff/  
4 applicant interactions that are not publicly  
5 noticed can get out of hand from the point of view  
6 of intervenors, that too much goes on.

7 And that's --

8 COMMISSIONER PERNELL: But if -- excuse  
9 me, I'm sorry --

10 MS. SIMON: Yes, please.

11 COMMISSIONER PERNELL: If drafted  
12 correctly, you're not opposed to looking at this  
13 section and doing some amendments to it to allow  
14 staff the flexibility to have conversations and  
15 still protect the perception of the intervenors as  
16 being involved?

17 MS. SIMON: That's exactly correct,  
18 Commissioner Pernell. And we would ask both the  
19 Commission and the staff, who know the most about  
20 it, to take a look at more precisely what it is  
21 that staff needs to be able to do and try to  
22 redraft from the point of view of preserving that,  
23 and that only, as available to the staff.

24 COMMISSIONER PERNELL: Okay.

25 MS. SIMON: Thank you.

1 COMMISSIONER PERNELL: Thank you.

2 PRESIDING MEMBER LAURIE: Anybody else  
3 in the audience? Yes, sir.

4 MR. CHAPMAN: Tony Chapman. A lot of  
5 the concern about this change, I think, goes to  
6 the question which I'm not sure I have an  
7 understanding of, so I'll ask the question.

8 The changes in language and the  
9 clarification in the language in this section, is  
10 it intended to solve a noticing problem, or a  
11 participation problem?

12 PRESIDING MEMBER LAURIE: It's intended  
13 to solve, in my view, a communications problem.  
14 That is communications are made more complicated  
15 when you have a public meeting attended by  
16 numerous individuals, as opposed to two people  
17 sitting across the table from one another. That's  
18 the issue.

19 MR. CHAPMAN: A communication problem  
20 then in the way the communications are managed?  
21 Or is it a communication problem in the question  
22 of whether the communication is successfully  
23 completed?

24 PRESIDING MEMBER LAURIE: I don't know  
25 if I can answer that question.

1                   MR. CHAPMAN: The communication and the  
2                   way things get communicated, this change exhibits  
3                   it well, in that this being placed here with, and  
4                   the way this change is communicated to me, as a  
5                   member of the public, is that you're somehow  
6                   attacking the level of public communication that's  
7                   being accepted, allowed, invited.

8                   And what that does is that just raises a  
9                   fear level which I believe all the public  
10                  participation that you receive in these  
11                  proceedings starts out with.

12                 You see the public arrive at the  
13                 beginning in fear. And that fear is strictly an  
14                 emotional level. It is hard to deal with from  
15                 your seat, it's hard to deal with from the staff's  
16                 seat.

17                 But that fear really only has two places  
18                 to go. Either a fight or a flight type reaction  
19                 to it. And once the public gets past that fear  
20                 they'll move into more of an investigation level  
21                 of what is happening.

22                 And if that investigation is squashed at  
23                 this point, then that public participation never  
24                 moves on to the next levels which are much more  
25                 important. And those levels of having an

1       understanding of the process, an understanding of  
2       a particular project, and then being able to  
3       provide input on it.

4               If this is trying to solve a problem of,  
5       a communication problem, or to some degree the  
6       management of that communication, what has  
7       happened in the past, I believe, from what I  
8       understand of the process, I believe you have a  
9       staff manager who, based upon their feeling of the  
10      people that they're dealing with, make decisions  
11      about what needs to be noticed, where it falls in  
12      the category of importance. And in writing we  
13      have a hard time handing that responsibility over  
14      to the staff manager.

15             And we're trying to clarify that  
16      somewhat. The recommendation, or the constructive  
17      thing that I think I want to lead this toward or  
18      recommend it toward is that the decision as to  
19      whether something should be noticed or not might  
20      be an issue that doesn't need to be addressed in  
21      this section, but in a section that would change  
22      the management of data requests.

23             If data requests were used more and less  
24      cumbersome, but continued to be recorded heavily,  
25      then the questions in your example of how many

1 monitoring stations. If that was handled in more  
2 of a data request style communication, then I  
3 believe it's going to be self-limiting. Because  
4 once the two parties feel that that is too  
5 cumbersome, I think you then have moved into a  
6 discussion that warrants public notification.

7 My concern and some of the other  
8 intervenors' concern, or the part of this that I  
9 understand the most, is that it reads like it's  
10 limiting my public access. And that's what I  
11 think you need to craft around. Because that's  
12 what fires all the fear buttons.

13 Thank you.

14 PRESIDING MEMBER LAURIE: Okay, thank  
15 you, sir, very much. Mr. O'Brien, could you look  
16 at that thermostat and see what it says? It's  
17 really hot in here.

18 (Pause.)

19 PRESIDING MEMBER LAURIE: What does that  
20 say, Mr. Buell?

21 MR. BUELL: The thermostat up there is  
22 reading what, 75 in here?

23 (Laughter.)

24 MR. BUELL: Obviously faulty, because I  
25 feel quite warm, myself.

1                   PRESIDING MEMBER LAURIE:   Okay.   Anybody  
2       else in the audience?

3                   Mr. Chamberlain.

4                   MR. CHAMBERLAIN:   I'll just make this a  
5       little more complicated.   In a court no party can  
6       communicate with the judge, but all parties are  
7       free to communicate with one another.

8                   When you analogize here, the reason  
9       people are concerned is because the staff does  
10      play an unusual role.   And usually what the staff  
11      decides is very important in the case.   And so  
12      people want to have the opportunity to have an  
13      equal chance at convincing the staff as to what  
14      the appropriate answer is.

15                  But there are situations in which there  
16      are other parties who are equally or perhaps even  
17      more important.   For example, the air quality  
18      agency may actually be more significant, what they  
19      think may be more significant than what the staff  
20      thinks.

21                  There's nothing in our regulations that  
22      can or does restrict the air quality agency from  
23      meeting with the applicant; from Communities for a  
24      Better Environment from meeting with the  
25      applicant; or any of the other parties from

1 meeting with one another.

2 Another concern is that the staff may  
3 need to meet with other governmental agencies.  
4 There are even situations in our statute that call  
5 for such conferences in situations where there may  
6 be a need for an override.

7 So I think we need to -- I don't know  
8 that what we've drafted here in subdivision (h) is  
9 the right answer, but we do need to consider  
10 whether the staff needs some more flexibility than  
11 it has right now to meet, for example, with air  
12 quality agencies.

13 If an air quality agency is meeting with  
14 the applicant to try and work out something, can  
15 the staff be in the room? Can they listen? Can  
16 they talk? These are questions that just aren't  
17 answered in our current regulations.

18 PRESIDING MEMBER LAURIE: Thank you,  
19 sir. Anybody else in the audience? Ms. Mendonca.

20 MS. MENDONCA: On Mr. Chamberlain's  
21 point, attached to the packet the intervenor's  
22 survey which was done in September of '99, and I  
23 believe there were like 57 people that we did  
24 outreach to.

25 Universally they agreed that if there

1       was to be any change, and they basically did not  
2       support any change to this section, but they had  
3       no problems with clarifying that the Energy  
4       Commission Staff could meet with other agencies  
5       such as Bill described.

6               I don't believe that change in any way  
7       brings up some of the issues that are before us  
8       today, the fear factor, the push buttons and such.

9               PRESIDING MEMBER LAURIE:  Mr. Ajlouny,  
10       very quickly, sir, since you've already had  
11       your --

12              MR. AJLOUNY:  Yes, just, you know, by  
13       talking I'm remembering some things and  
14       experiences.  And although it's very important  
15       that data requests are done, and I think that's a  
16       good way maybe to suggest for making it easier  
17       would be even better, or whatever is said or  
18       asked, if it's, you know, a quick question,  
19       there's no reason why an email couldn't be done.

20              But at the same time I'm forgetting  
21       about my rights to ask a question in my experience  
22       in the last two years.  Two ways:  Because the  
23       staff holds such an important part because they  
24       are what essentially comes out to the, you know,  
25       short of maybe the commitment of granting the



1       licensing, pretty much the EIR, the whole process.

2               And because they play such an important  
3       part, that is why there's so much emphasis on this  
4       and so much concern. But when an intervenor wants  
5       to ask a question to a staff, I think I have a  
6       right to ask that question, and I shouldn't have  
7       to wait till the workshop if the applicant doesn't  
8       have to wait for a workshop.

9               So, in these regulations I propose that  
10       intervenors have a right. Because I can tell  
11       you --

12               PRESIDING MEMBER LAURIE: Well, the  
13       language refers to all parties, does it not?

14               MR. AJLOUNY: But it doesn't say that  
15       the project manager must respond to my email. Or  
16       the project manager has to stop laughing in your  
17       face and say I'm not going to answer your question  
18       and just frustrate me more, Commissioner. And  
19       these are facts. I'm not trying to point out  
20       people, but that's the kind of frustration as an  
21       intervenor.

22               When I email a question I want an  
23       answer. And not, I'm not going to answer and  
24       that's tough. I mean that's -- so whether that's  
25       a hypothetical or real, I would like some

1 direction that the staff or even other parties  
2 that play such an important role, like the Bay  
3 Area Air Quality Management District and the ISO,  
4 they sit in the workshop, they sit in the hearings  
5 playing an important part, but when you try to  
6 call them or you email them, or whatever, I'm  
7 sorry, can't talk to you.

8 As a matter of fact, Commissioner, in  
9 the Metcalf case it came to the point that all the  
10 staff got an email that says, Do not talk to Issa,  
11 by name, and send all questions to me. And I  
12 won't say that name. But I have it. And so when  
13 I did, there's no response. That basically cut me  
14 off.

15 I'm just making the point, you see  
16 frustration because I'm starting to remember all  
17 these things I went through in the last two years.

18 So, just an important point that I, as  
19 an intervenor, have the rights to ask a question  
20 and a right to get an answer in a reasonable  
21 amount of time.

22 PRESIDING MEMBER LAURIE: Thank you.  
23 Ms. Simon.

24 MS. SIMON: Thank you, Commissioner. I  
25 am now confused and I'm hoping to take a minute to

1 clarify it so I don't write confused comments.

2 The question that Mr. Chamberlain and  
3 Ms. Mendonca discussed about staff conversation  
4 with other agencies, it appears to me that the  
5 existing regulations do not include other public  
6 agencies in the definition of party.

7 And that therefore this ought to be a  
8 nonissue. But, I'm wondering if I'm missing  
9 something?

10 PRESIDING MEMBER LAURIE: You are  
11 missing something, because of the confusion among,  
12 the confusion within the walls of this Commission,  
13 it is an issue. That's why it's being discussed  
14 today.

15 MS. SIMON: Thank you.

16 COMMISSIONER PERNELL: Well, in  
17 addition, I think that what Mr. Chamberlain  
18 described was another agency, and he's perking up  
19 there, so if I miss this, you might have to come  
20 up.

21 But an example of an air quality  
22 district meeting with applicant, and then having  
23 staff in that meeting, negotiating or talking  
24 about some mitigation, for example. So that is  
25 something different than staff talking to the air

1 quality district, themselves.

2 So maybe I need some clarification on  
3 that. Because when you add the applicant in, and  
4 they're negotiating mitigation, then I'm not sure  
5 where we fall under the present statutes.

6 Mr. Chamberlain?

7 MR. CHAMBERLAIN: Well, I think there  
8 are situations -- first of all, let me address the  
9 question of party status. Ms. Simon is correct,  
10 there can be situations where public agencies are  
11 not parties. There are also situations where they  
12 are parties in our proceeding.

13 And certainly the regulation (a) would  
14 suggest that staff would not -- subsection (a) of  
15 1710 would not be able to meet with those  
16 agencies, but I appreciated Ms. Mendonca's  
17 clarification. And we should look at that in  
18 terms of trying to rewrite the section.

19 Yes, I did make reference to a situation  
20 where an air quality agency, for example, might  
21 want to sit down with the applicant, and might not  
22 want to go through the full noticing and setting  
23 up of a public meeting in order to try and clarify  
24 the application. And perhaps even discuss what  
25 mitigations would be appropriate for that

1 particular project.

2 And there are situations, I believe,  
3 where staff feels that it is essential that they  
4 understand what kinds of communications are taking  
5 place between the air agency and the applicant.

6 And so I don't know exactly what  
7 decisions they make in each case, but I'm sure  
8 they are certainly tempted to send someone.  
9 Perhaps they don't speak, maybe they just listen.  
10 But currently our regulations just don't really  
11 define what the appropriate scope of behavior is.

12 COMMISSIONER PERNELL: Okay, so let me  
13 ask you this question. If they are not  
14 participating in the negotiation of some  
15 mitigation dealing with air quality, is that  
16 permissible? Or is that something we've got to  
17 look at?

18 I mean the distinction here is whether  
19 or not staff is doing some substantive changes or  
20 negotiating with the applicant. And if you put  
21 another agency in the room, does that change that  
22 criteria?

23 I mean I can understand if staff is  
24 sitting in the room understanding what the  
25 conversation back and forth between the applicant

1       and the agency, but once staff enters the  
2       conversation and suggestions on mitigation, then  
3       that throws it into a different light, in my  
4       opinion. And I'm just -- I mean I think it's when  
5       we begin to look at this section those are some  
6       things that we need to look at, as well.

7               MR. CHAMBERLAIN: I think however we  
8       redraft the section we're going to have to rely on  
9       staff's good judgment to insure that the important  
10      information that comes out of any meetings that  
11      take place that are not noticed is communicated to  
12      all the parties, so that everyone has the same  
13      information when you actually go into the hearings  
14      before the decision maker.

15             COMMISSIONER PERNELL: Okay.

16             PRESIDING MEMBER LAURIE: Okay, anything  
17      else?

18             MS. MENDONCA: Commissioner Laurie, my  
19      comments to Mr. Chamberlain were just the  
20      periphery. Basically I think probably public  
21      notice and the requirement of public notice is the  
22      strongest issue that the Public Adviser has. And  
23      my mandate is that I should seek to assure the  
24      widest possible public participation.

25             And the only way that you can assure

1 public participation is notice of what's going on.  
2 I think it's naive to say that the Energy  
3 Commission Staff is not a decision maker. The  
4 staff makes a myriad of decisions that lead to the  
5 ultimate proposal, which comes before the full  
6 Commission. But staff makes decisions about the  
7 scope of how wide an assessment and an analysis  
8 will be made. Staff makes the decision about how  
9 much time to spend at looking into issues.

10 And the only way I believe that the  
11 public can effectively be a participant is to know  
12 and be a part of the discussion. They can elect  
13 not to be a participant. They can elect to not  
14 show up to a noticed workshop, or not show up to a  
15 noticed meeting. But that is, in essence, saying  
16 I'm trusting the process, or I'm not concerned.

17 But in the absence of the opportunity to  
18 have notice of a meeting on a subject of  
19 importance to the project the public never gets to  
20 exercise its right to participate.

21 PRESIDING MEMBER LAURIE: Okay, but  
22 let's assume for purposes of discussion the intent  
23 of the reg change is not to inhibit workshops or  
24 public meetings. Let's assume that for purposes  
25 of discussion as to the intent.

1                   So what we're talking about are other  
2                   conversations that take place in addition to such  
3                   public meetings.

4                   Now, if I accept your comment that the  
5                   only way for the public to be able to express  
6                   themselves is through the public meeting -- just a  
7                   minute, let me finish -- then you are adopting Ms.  
8                   Simon's view that the local government process has  
9                   been fatally flawed for 50 years.

10                  And that local government process has  
11                  made hundreds of thousands of decisions, all being  
12                  subjected to public hearings of one form or  
13                  another, but --

14                  MS. MENDONCA: Right, but --

15                  PRESIDING MEMBER LAURIE: -- very few of  
16                  which have inhibited all party discussion with  
17                  staff. That's my difficulty.

18                  MS. MENDONCA: Well, I find there's a  
19                  significant difference. Most local decisions are  
20                  immediately appealable by participants who were  
21                  left out of the process to their local superior  
22                  court.

23                  Our process is set up that our only  
24                  appeal or a public member appeal is to the  
25                  California Supreme Court. And you have a pretty



1 high hurdle.

2 I would think that in order to get to  
3 the Supreme Court with a concern that in order to  
4 feel that we were fair in going that high to  
5 express a concern, that we would have the most  
6 open and participatory process possible.

7 I don't see our process as equivalent to  
8 a local process, because if you're outside of a  
9 local process, or you get into the local process  
10 late, you have a readily available way of taking  
11 an issue with the decision.

12 In our situation it doesn't work like  
13 that. I find them not comparable.

14 PRESIDING MEMBER LAURIE: Okay.

15 COMMISSIONER PERNELL: Ms. Mendonca,  
16 we -- I mean your advocacy for the public should  
17 be commended, but Commissioner Laurie has said a  
18 couple of times that I've taken notice, that we're  
19 not trying to eliminate any public access or  
20 process.

21 Everybody has spoken -- not everybody,  
22 but most of the comments have said there's  
23 something wrong with (h) and it needs to be  
24 revisited. And I think that's what we're trying  
25 to do.

1                   When we do noticing to the public for  
2           workshops, et cetera, that, I mean, is not in  
3           question here. But for staff -- is that in  
4           question?

5                   MS. MENDONCA: Yeah, I believe that the  
6           language that is currently before us eliminates  
7           the ability to require notice. In the absence of  
8           the ability to require --

9                   COMMISSIONER PERNELL: Notice of  
10          workshops that will be held in the community?

11                  PRESIDING MEMBER LAURIE: No, no, no,  
12          no. Where are you getting that?

13                  MS. MENDONCA: In the absence of a  
14          requirement that meetings between the applicant  
15          and staff being noticed, there is no requirement  
16          that workshops be held. They are linked.

17                  It's a nice thing to say that we want to  
18          have workshops, and I agree, it's great. But in  
19          the absence of a requirement that conversations  
20          between the applicant and staff are noticed, there  
21          is no ability to compel a workshop or require a  
22          workshop.

23                  COMMISSIONER PERNELL: All right, then,  
24          if that is, indeed, the point, I'm sure that  
25          that's not the intent of the Committee to not

1 notice workshops.

2 PRESIDING MEMBER LAURIE: Okay.

3 COMMISSIONER PERNELL: Thank you.

4 MS. MENDONCA: Yes, thank you.

5 PRESIDING MEMBER LAURIE: Yes, sir.

6 MR. AJLOUNY: Just a quick comment. If  
7 what you're thinking is making some kind of  
8 provision to say you must have a workshop on these  
9 topics, at least one workshop, and then, you know,  
10 go ahead with having other meetings without  
11 notice, I think that will only provide what  
12 Commissioner Laurie's talked about, a difference  
13 of perception.

14 I mean if that happens what will happen  
15 in those workshops are applicant and staff have  
16 talked, you know, made their talks and conference  
17 calls and all ready when they get to the workshop  
18 it's like, it's just like a phony-baloney kind of  
19 thing that just makes everyone feel happy they  
20 were part of the participation.

21 And that won't work. That just won't  
22 work. You need to have anything that's talked  
23 about in the public, period.

24 Because right now you have that, and  
25 they're still doing it. So if you open the door

1       just a little bit more, now you're going to have,  
2       you know, a lot more going on. More flexibility.  
3       The door needs to be shut.

4               PRESIDING MEMBER LAURIE: Okay, thank  
5       you. Let's move on to the next item, Mr. Buell.

6               MR. BUELL: Yes. The next section of  
7       the regulations is section 1712, which deals with  
8       the rights to become a party, and the rights and  
9       duties of the parties.

10              The initial draft proposed changing  
11       section (b). Staff has no problems with the  
12       intent of this section. We would note that the  
13       addition of the word intervening in the first  
14       sentence is actually unnecessary because by adding  
15       that it adds confusion as to what the role and  
16       rights of the applicant and staff are in the  
17       process, since they're not intervenors to the  
18       process. It becomes unclear.

19              So, other than that we would agree with  
20       the language that's being proposed.

21              PRESIDING MEMBER LAURIE: Okay. Anybody  
22       want to comment on that section? Ms. Simon.

23              MS. SIMON: CBE agrees with the staff  
24       about the confusion introduced by intervening  
25       party, but I fear we also have to say that the

1 second edition as provided for in section 1212  
2 also introduces confusion. Since section 1212  
3 does not deal with motions, petitions, objections  
4 or briefs, which are the nouns in the sentence  
5 prior to the phrase, as provided for in section  
6 1212 --

7 PRESIDING MEMBER LAURIE: So you think  
8 1212 is inapplicable to sub (b)?

9 MS. SIMON: 1212 is about hearings and  
10 evidence and testimony. Then in 1712(b) parties  
11 are given rights to present witnesses, et cetera,  
12 and to file motions, petitions, objections, briefs  
13 and other documents relevant. And all of that is  
14 referenced to section 1212, which doesn't cover it  
15 all.

16 And that, to me, creates some ambiguity  
17 about whether there is some intention, I don't  
18 believe it's the Commission's intention at all, I  
19 believe this is a drafting problem, to somehow  
20 take the broad discretion vested in the Presiding  
21 Member by the revised proposal of 1212, and carry  
22 it over not just to hearing testimony, but to  
23 intervenors' ability to file motions, petitions,  
24 objections and briefs, which would be quite a  
25 problem were that to occur.

1                   And we would just like to suggest that  
2                   as drafted this proviso raises that issue. And  
3                   it's not intended that that section, that proviso  
4                   either be eliminated, which is our suggestion, or  
5                   put where it's intended to go.

6                   PRESIDING MEMBER LAURIE: Okay, we'll  
7                   take a look. Okay, thank you. Anybody else need  
8                   to comment on that section?

9                   MR. AJLOUNY: I just want to understand  
10                  something. Is there anything in this document  
11                  that talks about any changes in the fact of when  
12                  you can and when you cannot be an intervenor? I  
13                  thought there was something in here and I maybe  
14                  misread it, but that (a), that's already been in  
15                  here, 1712(a)? Is that where it talks about where  
16                  you --

17                  PRESIDING MEMBER LAURIE: 1712(a) is not  
18                  being added.

19                  MR. AJLOUNY: And that's the part where  
20                  basically a Commissioner can say yea or nay to a  
21                  person's petition to be an --

22                  PRESIDING MEMBER LAURIE: There's no  
23                  proposed changes to that.

24                  MR. AJLOUNY: Okay.

25                  PRESIDING MEMBER LAURIE: Mr. Buell,

1 next section, please.

2 MR. BUELL: Next section is 1714.5.

3 There's a proposal to add section (d), which  
4 basically requires the staff to give great  
5 deference to the opinions of other state agencies.

6 I'd like to say that staff thinks it  
7 always has given great deference to the opinions  
8 of other state agencies.

9 But we feel that this section  
10 potentially is overly restrictive; that it doesn't  
11 allow staff to consider other factors that may be  
12 relevant, in addition to whether an opinion of a  
13 state agency applies, is legally correct or not  
14 correct.

15 For example, we may find that there's an  
16 environmental impact that results from a project  
17 which isn't addressed specifically by a state  
18 agency's regulations. And we feel that we should  
19 have the opportunity to present that information  
20 and provide a whole picture to the Committee on  
21 the issues that pertain to that subject matter.

22 We also note that outside the scope or  
23 the purview of many Committees the staff has  
24 negotiated with a number of state agencies to try  
25 to correct or try to negotiate a reasonable

1 position with those agencies. And that requiring  
2 us to take great deference with those might  
3 preclude our ability to have negotiations to reach  
4 a common ground on what may be an appropriate  
5 mitigation measure, what might be in the best  
6 interest of the State of California from an energy  
7 policy.

8 So we would recommend against adding  
9 section (d) to the regulations.

10 PRESIDING MEMBER LAURIE: Okay.

11 MS. MENDONCA: Commissioner Laurie, I  
12 would agree with staff and call to your attention  
13 a comment received by the Public Adviser from the  
14 South Coast Air Quality Management District which  
15 takes the opposite view. And it's in your packet.

16 MR. BUELL: We also received --

17 PRESIDING MEMBER LAURIE: Mr. Buell, has  
18 Mr. Therkelsen signed off on staff comments?

19 MR. BUELL: Yes, he has.

20 PRESIDING MEMBER LAURIE: The only  
21 reason I ask is, you know, I thought that he was  
22 in agreement with this language from many  
23 conversations that I had with him over a period of  
24 time. Thus, I have to admit to a degree of  
25 surprise by a change in position.



1           Let me tell you what I think the intent  
2           of this language is. The State of California is a  
3           big complex organization, and so it's divided into  
4           sections. There's the State of California Fish  
5           and Game, the State of California Water Resources;  
6           there's the State of California Department on  
7           Toxic Substance Control.

8           All of these agencies have experts in  
9           it, and they're designed specifically to address  
10          questions within their jurisdiction.

11          And then we're here. And, you know,  
12          among our staff and consultants we have people who  
13          know about water and who know about air and who  
14          know about noise and all of that.

15          So the question I would pose is how many  
16          times do the people of the State of California  
17          have to pay for the same advice. That is if the  
18          agency charged with responsibility for making  
19          decisions within their jurisdiction, make a  
20          decision, then why in the world should the people  
21          of the State of California pay twice to have  
22          somebody second-guess the position of one of the  
23          agencies of the state.

24          That's my question. Now, if comments of  
25          an agency are restricted from A to B, and C has an

1 obligation to address issues from A to C, so  
2 there's a differential of from B to C, well,  
3 that's not the point that I'm trying to get at.

4 I'm trying to get at why is our staff  
5 second guessing the professional staff position of  
6 another agency from A to B.

7 MR. BUELL: I think that my answer to  
8 that is that there's more to the energy game than  
9 meets the eye. And what I mean by that, based on  
10 my experience over the years, is that many state  
11 agencies have not looked at the energy overlay on  
12 the policies that they've put forward.

13 And I think that it's not so much of  
14 doing their job over for them, as to try to pry  
15 that perspective, to put things in perspective on  
16 what is a reasonable policy that meets not only  
17 that state's jurisdiction, but also the needs of  
18 California from an energy perspective.

19 And it's that nuance that I think that  
20 we need to allow the discussion between staff and  
21 other agencies to come to a reasonable or  
22 concurrent position.

23 I see the language of giving great  
24 deference meaning we don't even have the authority  
25 to question what they say. And I think that

1       that's a mistake.

2               PRESIDING MEMBER LAURIE:  That's not --

3               COMMISSIONER PERNELL:  Let me offer  
4       another scenario, and that is if we have two  
5       competing agencies that have difference of  
6       opinion, for example, if you do the pollution  
7       control board that is close to a beach or a strip  
8       of beach, and then you have the Coastal Commission  
9       who wants to do something different.

10              Whether we, in this particular language,  
11       we have nothing to say, and we hold up something  
12       until they fight it out or go to court.  I would  
13       agree that at some point, I mean there needs to be  
14       some discretion for examples of where the two  
15       agencies have overlapping jurisdiction, and who  
16       breaks that stalemate.

17              MR. BUELL:  I think that's an excellent  
18       example, where we have the Coastal Commission and  
19       agencies dealing with biological resources is  
20       certainly an area that comes to mind.  Another one  
21       is air quality, where we have state requirements  
22       and federal requirements that may not always be in  
23       absolute agreement in trying to resolve those  
24       issues.  Staff can play a role in trying to  
25       facilitate that resolution.

1           MR. MUNDSTOCK: To add a little more, I  
2 believe that if this section became part of the  
3 regulations, it would, itself, become a matter of  
4 controversy regarding what it means and how to  
5 interpret it in case after case.

6           For example, what is a state agency?  
7 That is not at all a simple matter. Because you  
8 have a whole host of different kinds of regional  
9 agencies, agencies such as air districts which  
10 could be state, federal, local, who knows.

11           And I believe that we would end up with  
12 one after another dispute over which agencies are  
13 covered by the regulation. We would have disputes  
14 over how this relates to the California  
15 Environmental Quality Act because the most likely  
16 scenario where there is a problem between staff  
17 and another agency is where staff believes that  
18 what they've done does not satisfy the  
19 requirements of CEQA.

20           And I think that dispute would then --  
21 now, we clearly have a right to raise the CEQA  
22 issue. Here, it's a going to be perhaps the first  
23 thing argued about after we get through the  
24 question of what's a state agency.

25           And so I think this would be --

1                   PRESIDING MEMBER LAURIE: Mr. Mundstock,  
2           what do you think is our current application of  
3           the rules regarding our staff review of comments  
4           submitted by other state agencies?

5                   MR. MUNDSTOCK: I think the --

6                   PRESIDING MEMBER LAURIE: What do you  
7           think the current rule is?

8                   MR. MUNDSTOCK: My opinion is that we  
9           try very hard to reach consensus with other state  
10          agencies wherever that is humanly possible and  
11          reasonable in a case.

12                  MR. BUELL: I would add that I think  
13          that we attempt to give their opinion great  
14          deference as a matter of staff, certainly as  
15          you've pointed out there they have the expertise  
16          in many areas that staff only has minor expertise  
17          in in some cases.

18                  But I think that staff needs the  
19          opportunity to consider all the facts that might  
20          pertain to a subject area, and that includes the  
21          environmental consequences of the action.

22                  PRESIDING MEMBER LAURIE: Okay, well,  
23          let's look at it not from an Energy Commission  
24          perspective, but from an overall good government  
25          perspective.

1                   What do you think the government's  
2           response would be -- strike that. What do you  
3           think the general public's response would be if  
4           the general public knew that they were paying a  
5           professional for their advice, and then they were  
6           paying another professional to review the advice  
7           of the first professional?

8                   Does that make good government sense to  
9           you?

10                   MR. MUNDSTOCK: Can I try to respond  
11           simply on the California Environmental Quality Act  
12           issue. It is very often the case that an agency  
13           will look to its own statute or regulations for  
14           conformity, and will not look to the question of  
15           whether the result is a significant adverse  
16           environmental impact under the California  
17           Environmental Quality Act.

18                   So it is not duplication. We are the  
19           lead agency under CEQA. So staff actually takes  
20           upon itself its legally required separate burden  
21           of saying, okay, the agency says this is  
22           compliance with its statute and regulations. We  
23           now look at a different question. Is there  
24           remaining a significant adverse environmental  
25           impact.

1                   PRESIDING MEMBER LAURIE: Well, if  
2                   there's a different --

3                   MR. MUNDSTOCK: For example, --

4                   PRESIDING MEMBER LAURIE: -- if there's  
5                   a different question, that doesn't bother me.

6                   MR. MUNDSTOCK: But that's normally what  
7                   staff is doing. That is the classic staff  
8                   argument with local air districts who may or may  
9                   not be state agencies, by the way.

10                  A local air district does not deal with  
11                  the California Environmental Quality Act at all.  
12                  We do. And so that has led to the series of  
13                  disagreements with local air districts.

14                  And the same thing could happen with a  
15                  state agency. So that there is not the  
16                  duplication you are talking about. There is, in  
17                  fact, staff trying to carry out its separate  
18                  statutory role as the lead agency under the  
19                  California Environmental Quality Act.

20                  And that's one of the major reasons why  
21                  staff has a problem with adding this impediment to  
22                  the regulations.

23                  PRESIDING MEMBER LAURIE: Thank you,  
24                  sir. Mr. Joseph.

25                  MR. JOSEPH: Thank you, Marc Joseph for

1 CURE. Commissioner Laurie, one way to interpret  
2 what you're saying is, look, we have these expert  
3 responsible agencies out there who have the  
4 expertise. Let them do their job, and let's us  
5 just take it in and not second guess it.

6 As Mr. Mundstock said, and you're a  
7 CEQA -- CEQA requires exactly the opposite. CEQA  
8 requires that the determination of whether a  
9 project may have a significant effect on the  
10 environment be made by the lead agency, not the  
11 responsible agency.

12 So it's necessary for this Commission to  
13 review, and not simply accept the actions, the  
14 recommendations of the responsible agency.

15 Now, obviously what happens in practice  
16 is a great deal of deference, --

17 PRESIDING MEMBER LAURIE: I don't have  
18 any problem with that. The problem is that in the  
19 last four and a half years since I've been here,  
20 in posing that question among various members of  
21 staff, including the Siting Committee Staff, I've  
22 gotten answers all over the board as to what  
23 individuals think the role of our staff is vis-a-  
24 vis other agencies. Okay.

25 MR. JOSEPH: Let me give you one example



1       where this kind of language could lead to  
2       problems.

3               An air district is reviewing the  
4       emission rates and proposed offsets for a project.  
5       The air district says, okay, we think this is  
6       BACT, and we think these offsets meet our rules  
7       and they're acceptable.

8               The staff has a responsibility to not  
9       simply accept, and the Commission has a  
10      responsibility to not simply accept that these  
11      offsets and the inquiry as to the adequacy of  
12      those offsets two different ways.

13              One, the offsets may be from such a  
14      distant part of the air district that, in fact,  
15      they don't remove the impact of the emissions  
16      immediately surrounding the plant.

17              If you think of it as a different  
18      question then we have no disagreement here.  If  
19      you think of it as are the offsets adequate, then  
20      that's not some place you should show deference.

21              Another example, --

22              PRESIDING MEMBER LAURIE:  So there are  
23      circumstances where the law would require  
24      additional independent examination, is that what  
25      you're saying?

1                   MR. JOSEPH: Yes, yes. Another type of  
2                   example. The offsets may be close enough, but  
3                   perhaps while the offsets satisfy the requirement  
4                   to offset NOx emissions, they generate additional  
5                   toxic emissions.

6                   So the Commission may want to say  
7                   whether or not those offsets meet the air district  
8                   requirement, we're not going to accept them  
9                   because we don't want the additional toxic impacts  
10                  created by generating those offsets.

11                  PRESIDING MEMBER LAURIE: Okay.  
12                  Commissioner Pernell.

13                  COMMISSIONER PERNELL: No, I'm okay.

14                  MR. JOSEPH: Thanks.

15                  PRESIDING MEMBER LAURIE: Thank you,  
16                  sir. Members of the audience wish to comment on  
17                  this section?

18                  MR. KELLY: Steven Kelly, Independent  
19                  Energy Producers, again.

20                  Just a couple comments. First, from a  
21                  developer perspective, it's important that we see  
22                  some finality in some of the state decisions that  
23                  come out of the state agencies. And we support  
24                  the language that would provide for the deference  
25                  that is prescribed in this language.

1           I'd note that disputes are already  
2       occurring, so it's not likely that this language  
3       is going to result in greater disputes. I think  
4       the intent here is to try to reduce the amount of  
5       disputes and to move forward in a timely manner.

6           And I'll note that the language provides  
7       for deference in those situations where it's  
8       within the area of expertise of the other agency.

9           And some of the comments that I've heard  
10      to date would suggest a focus on perhaps issues  
11      that are not in the area of expertise of the  
12      agency to which you're deferring, and would  
13      rightfully come before this Commission in its  
14      normal processes.

15          So, I think there's a way to carve out a  
16      process that would provide the deference to a  
17      state agency for those areas within its expertise,  
18      allow that to move forward, and still provide you  
19      the flexibility to note that and make changes as  
20      necessary. But also provide some semblance of  
21      certainty to a developer moving through the  
22      process that the state is, indeed, speaking with  
23      one voice on those issues that are coming up in a  
24      sequential fashion.

25          So I just leave that to you.

1                   PRESIDING MEMBER LAURIE: Mr. Chapman.

2                   MR. CHAPMAN: Tony Chapman. If this  
3 language was approved I believe it feeds to two  
4 additional questions. If you're going to give the  
5 expert the deference, then the question comes up  
6 as does elsewhere in the regs does the staff have  
7 the power to review, subpoena the data,  
8 background, standards, whatever the expert may  
9 have used to reach his decision or recommendation?

10                  PRESIDING MEMBER LAURIE: And that  
11 answer is yes.

12                  MR. CHAPMAN: Okay. And then if in the  
13 course of your hearings and your process, if that  
14 data and that decision is challenged, who then is  
15 going to should the responsibility to support?

16                  COMMISSIONER PERNELL: That's a question  
17 to us. Say that again? I'm sorry, I --

18                  MR. CHAPMAN: If you're agreeing that  
19 this is your expert and that you're going to  
20 accept their recommendation, --

21                  COMMISSIONER PERNELL: Another state  
22 agency?

23                  MR. CHAPMAN: Right.

24                  COMMISSIONER PERNELL: Right.

25                  MR. CHAPMAN: But now that is part of

1 the formula for acceptance of a siting case, then  
2 if that information, if that decision, if that  
3 data is challenged, isn't it the staff that then  
4 is going to be shouldered with the responsibility  
5 to make the information stand up?

6 COMMISSIONER PERNELL: Legal?

7 MR. CHAPMAN: Or would they have the  
8 power to push it back to the other agency and say,  
9 hey, somebody doesn't like your answer here,  
10 you're going to have to come in and make it stand  
11 up in my court?

12 COMMISSIONER PERNELL: All right, let's  
13 try and get you an answer from our legal counsel.

14 MR. MUNDSTOCK: In my opinion,  
15 Commissioner, he's probably correct that if staff  
16 had in fact erred and not done an independent  
17 analysis, then the record could be flawed unless  
18 you then brought the agencies in to testify.

19 But, again, I'm not exactly sure what  
20 the proposed language actually directs staff to  
21 do.

22 MR. CHAPMAN: The one instance, and this  
23 may be far fetched, but I think it goes back to  
24 the previous section conversation is that somewhat  
25 of what you're dealing with here is a

1 communication management question, in that -- and  
2 this is just a scenario -- in that if the other  
3 agency was in negotiations with the applicant to  
4 build a mitigation package of some type, and that  
5 was done without the knowledge of the staff, and  
6 without being recorded into this process, the  
7 public would have red flags flying everywhere.

8 Because they're not going to see the  
9 movement from point A to point B. So this, I  
10 believe, ties back to some of the concern of when  
11 do you start recording, you know. If you have a  
12 staff member sitting in and listening to an air  
13 board and they're moving back and forth and trying  
14 to come to an end game, how does that then load  
15 the staff with the requirement to defer to their  
16 expert opinion and recommendation?

17 COMMISSIONER PERNELL: So, Mr. Chapman,  
18 you're opposed to this section, is that right? Or  
19 you want to say amend it? I'm just trying to get  
20 a sense of where we are.

21 MR. CHAPMAN: Well, I believe I'm  
22 opposed to it in that we're going back to, I think  
23 the staff has to be saddled with providing a  
24 professional product under their way of doing  
25 business.

1                   And if their hands are crimped at every  
2           turn in just creating a good product because  
3           they're forced to accept this person's review  
4           without being able to test it, themselves, or  
5           being able to require them to come on board.

6                   I think the premise of this, and I agree  
7           that we don't, as a citizen of the State of  
8           California, I don't want everything tested three  
9           and four times.

10                   But is this is the licensing agency,  
11           then they need to have the power to make this a  
12           good regulation. Whatever -- I'm not qualified to  
13           tell you what, but I believe something in addition  
14           to this is going to be needed.

15                   If you are going to accept their  
16           expertise, then somewhere in the system you need  
17           the power to back it up.

18                   PRESIDING MEMBER LAURIE: From a good  
19           government perspective, and I would hope that  
20           perspective is relevant to our proceedings, if we  
21           are finding that -- and let me separate out the  
22           separate questions that we might ask. Mr. Joseph  
23           talks about CEQA; Mr. Mundstock talks about CEQA.

24                   That's fine, I don't have any problem  
25           with that. If state agency is giving to us all

1 the comments regarding from A to B, and CEQA is  
2 from B to C, and state agency doesn't talk about  
3 that, then this is not duplicative.

4 So, I'm only going to that area that is  
5 within the jurisdiction of the other state agency.

6 If we find that there are deficiencies  
7 in the recommendations of the other state  
8 agencies, I've heard comments that they don't have  
9 their act together, or they don't know what  
10 they're doing, then maybe we have an obligation to  
11 go educate them and let them know what it is that  
12 we're really looking for, as opposed to an  
13 arrogant approach that we know better than they  
14 do. And they're getting paid probably more than  
15 we're getting paid.

16 The ultimate being that the consumer is  
17 getting it stuck to him. So maybe there's a  
18 better way to address the perceived deficiencies.

19 I do not seek to restrict our staff from  
20 doing their job. That's in addition to the  
21 responsibility of the other state agency. What I  
22 do question is if we're paying somebody to do  
23 their job, then I really don't want to pay  
24 somebody else to do their job again.

25 If they're doing their job in a failing



1 manner, then they should be fired, or there should  
2 be some other method of correcting their  
3 deficiencies, rather than paying some other agency  
4 to review it.

5 MR. CHAPMAN: I don't think that power  
6 exists in your regs, either.

7 PRESIDING MEMBER LAURIE: Yeah, well, I  
8 think you're right.

9 MR. CHAPMAN: Thank you.

10 COMMISSIONER PERNELL: Thank you.

11 PRESIDING MEMBER LAURIE: Thank you,  
12 sir.

13 Ms. Simon.

14 MS. SIMON: Thank you, Commissioner.

15 CBE is opposed to proposed section (d) and we  
16 don't think it can be fixed.

17 PRESIDING MEMBER LAURIE: Which part?

18 MS. SIMON: To all of it.

19 PRESIDING MEMBER LAURIE: So you don't  
20 think that we should give great deference to other  
21 state agencies?

22 MS. SIMON: I think that the problems  
23 that the staff identified are real. I think in  
24 practice the staff does give deference to those  
25 things that are truly within the technical

1 expertise of other agencies.

2 But I don't believe, Commissioner  
3 Laurie, that CEQA actually allows the segregation  
4 of A to B and B to C that you've been  
5 hypothesizing in your comments.

6 The responsibility of a lead agency  
7 under CEQA is to look at the environmental impacts  
8 of the entire project from start to finish,  
9 including mitigations, including unavoidable  
10 unmitigatable impacts, the whole nine yards.

11 PRESIDING MEMBER LAURIE: Okay, let me  
12 ask this.

13 MS. SIMON: Once -- yes.

14 PRESIDING MEMBER LAURIE: You are a  
15 consultant to City X with the responsibility to  
16 write the EIR. Going through the clearinghouse,  
17 Department of Water Resources says this is the  
18 deal, these are our comments.

19 As the consultant hired by City X to  
20 write that EIR, what do you do with that  
21 information?

22 MS. SIMON: I look at it critically with  
23 all the other information that I'm getting. Now,  
24 as a practical matter I may cut corners. And  
25 that's one of the reasons why a lot of local EIRs

1 wind up in court is that kind of corner-cutting.

2 But I think the principle that the local  
3 agency is the lead agency and is responsible under  
4 CEQA for the entire analysis is one that I, as the  
5 consultant and the local government that has hired  
6 me, would not quarrel with, even if there are  
7 constraints on how that responsibility is carried  
8 out.

9 The reason I suggest with respect that  
10 proposed (d) is not salvageable is that as Mr.  
11 Mundstock said in a slightly different context in  
12 his comments about this, one can't separate out  
13 another agency's area of expertise from this  
14 agency's responsibility to evaluate the  
15 environmental impact of the entire project.

16 PRESIDING MEMBER LAURIE: Okay, question  
17 for you. Again, you're a city council person.  
18 And you have a project before you, and the issue  
19 is water. You have a letter before you from the  
20 water purveyor, and it says we got plenty of  
21 water.

22 What is your responsibility as a city  
23 council person, with that letter in front of you  
24 from the water purveyor that says we have plenty  
25 of water? Is it your responsibility to conduct an

1 additional study to determine whether you believe  
2 the water purveyor or not?

3 MS. SIMON: Not necessarily. But not  
4 necessarily no. Suppose the water purveyor sends  
5 in that letter, but another agency or public  
6 commenter comments or provides information that  
7 actually an assumption on which the water  
8 purveyor's letter is based has been demonstrated  
9 by a recent study to be false.

10 You are then in the position that you  
11 ought not simply to rely on the information  
12 provided by the water purveyor.

13 PRESIDING MEMBER LAURIE: So would you  
14 start off with the presumption that the water  
15 purveyor's information should be relied upon?

16 MS. SIMON: Yes, and indeed I believe  
17 the staff of the Energy Commission does have the  
18 presumption that the technical evaluations of  
19 commenting agencies ought to be relied on.

20 PRESIDING MEMBER LAURIE: See, I don't  
21 know that.

22 MS. SIMON: Well, it certainly looks  
23 that way to us. If there are other circumstances  
24 in which that's not true, I find that interesting.

25 But again here, with respect,

1 Commissioner, I think the cure proposed by this  
2 section (d) is worse than the disease. The  
3 disease is, as you have put it out to us, is a  
4 certain level of confusion and inconsistency in  
5 the staff. The proposed cure would be for the  
6 agency to be abandoning what it is legally  
7 required to do by CEQA. They're not commensurate.

8 And it seems to me that if the staff are  
9 confused or are inconsistent, it would be better  
10 for everyone for some management to occur in  
11 relation to getting the staff on the same page,  
12 which would have the added benefit of providing  
13 more consistency across determinations on  
14 projects.

15 PRESIDING MEMBER LAURIE: Well, we'll  
16 see if we can get that out of this process. Thank  
17 you, Ms. Simon.

18 Anybody else? Mr. Kelly.

19 MR. KELLY: This may be my own confusion  
20 but I've never read great deference to be total  
21 deference. And I still don't see the problem  
22 that's referred here.

23 Great deference to me implies that staff  
24 or the Commission can, upon information that  
25 suggests the evidence that has already come in is

1 wrong, can step in and correct the record, or  
2 alter the decision.

3 I think to me what great deference  
4 suggests is that you will defer to those agencies  
5 that have the -- within their area of expertise  
6 for those issues for which there is no evidence  
7 that it would not be sound judgment or  
8 recommendations.

9 So, I think the situation that has been  
10 talked about is one of -- which would imply total  
11 deference to another agency I don't think is in  
12 the language that is before us today.

13 MR. BUELL: If I might reply to that.  
14 The last portion of the proposed change indicates  
15 that except to the extent staff concludes that  
16 such comments are in conflict with other laws of  
17 the State of California, which means the only way  
18 that we could actually not defer to the local or  
19 the state agency, rather, is if we found a  
20 conflict in law, not one of CEQA.

21 So, the way that it's written is what  
22 presents the problem. And that's --

23 PRESIDING MEMBER LAURIE: Did you say  
24 that doesn't include CEQA?

25 MR. BUELL: Would not include CEQA.

1                   PRESIDING MEMBER LAURIE: Okay, well,  
2           let's say CEQA was included.

3                   MR. BUELL: Well, then that's what  
4           presents the problems. Now I have to write all  
5           the nuances, all the exceptions into this rule.  
6           And that becomes very tenuous to write a  
7           regulation and that's why staff simply proposed to  
8           not support this.

9                   In order to put on those nuances, all  
10          those caveats into the situation, it becomes very  
11          burdensome and very confusing.

12                   PRESIDING MEMBER LAURIE: Okay, thank  
13          you. Anybody else? Mr. Joseph.

14                   COMMISSIONER PERNELL: Mr. Joseph.

15                   MR. JOSEPH: Thank you, Commissioner  
16          Laurie. I want to throw out two other issues  
17          separate from CEQA considerations.

18                   You know, you have several times today  
19          made the analogy to what if we were a local  
20          government, how would we be doing it. You're not  
21          a local government, though, you're an agency set  
22          up with a specific mission, and that is one of  
23          which is siting power plants. You are the experts  
24          in power plants, nobody else is.

25                   And one of the benefits of that is that

1       you can see, for example, you may have a series of  
2       plants which you licensed at an emission rate of,  
3       to pick a non-real number, 25. And then you have  
4       a power plant proposed in a district which is  
5       remote, which has -- the district has no  
6       particular expertise in power plants, it's their  
7       first power plant, and they say exactly within  
8       their area of expertise BACT is 30.

9               I think it's your responsibility to step  
10       in and say, no, BACT is 25. We know this because  
11       we are the expert statewide agency.

12              Separate from that, you have within your  
13       power the ability to make policy decisions which  
14       are above and beyond the strict requirements of  
15       law. You can say this is not required by law.  
16       You can do without this piece of pollution control  
17       equipment by law. The agency is willing to grant  
18       you a license, a permit to do this without this  
19       particular provision by law.

20              They haven't made any factual error, but  
21       as a matter of policy, we want our power plants to  
22       be better.

23              PRESIDING MEMBER LAURIE: Why would you  
24       do that if there weren't any environmental impacts  
25       requiring you to do it?



1                   MR. KELLY: Well, let's take an example  
2                   that I was going to bring up when you got to the  
3                   other sections not discussed. And that's water  
4                   use.

5                   There may be no law in this state which  
6                   prohibits unlimited amounts of fresh water to be  
7                   used in power plant cooling, but I think far more  
8                   pressing than anything you have proposed in these  
9                   regulations is the need for this Commission to  
10                  adopt a policy about the use of fresh water.

11                  Right now it's very haphazard, and we  
12                  are, I mean just read the newspapers, the next  
13                  crisis California is facing is a water shortage.  
14                  And here we are licensing plant after plant after  
15                  plant to evaporate fresh water.

16                  PRESIDING MEMBER LAURIE: And whose  
17                  responsibility do you think it is to adopt the  
18                  policy regarding water use for power plants? Is  
19                  that the responsibility of the Energy Commission,  
20                  or is it the responsibility of the water agency?

21                  MR. KELLY: I think it's both. You are  
22                  certainly charged with the responsibility for  
23                  policy with regard to power plants. And I think,  
24                  you know, there's also argument the State Board  
25                  can do something, and an argument that they have,

1 perhaps ineffectively.

2 PRESIDING MEMBER LAURIE: And should we  
3 be giving great deference to the views of the  
4 agency responsible for promulgating those  
5 policies?

6 MR. KELLY: I think you have a  
7 responsibility to look around and say, you know  
8 what, they acted 25 years ago. Right now we can  
9 see we have 10 million more people than we had in  
10 1977 when we had the last drought. And we have to  
11 make a new policy. And it's our responsibility  
12 because we are the agency in charge of power  
13 plants.

14 PRESIDING MEMBER LAURIE: Okay.

15 COMMISSIONER PERNELL: I have a question  
16 for Mr. Mundstock. On this issue, CEQA requires  
17 the lead agency to make the decision, is that  
18 correct? I'm just --

19 MR. MUNDSTOCK: In general terms, yes.

20 COMMISSIONER PERNELL: In general terms.  
21 And our siting process is CEQA equivalent?

22 MR. MUNDSTOCK: We are the lead agency.  
23 We don't do an EIR. What we do is the functional  
24 equivalency of an EIR.

25 COMMISSIONER PERNELL: Right. So if we

1 change our rule does that then make us in  
2 violation of CEQA?

3 MR. MUNDSTOCK: I would say if you  
4 adopted this section perhaps persons in this room  
5 or others could argue to Resources that this calls  
6 into question our maintaining the functional  
7 equivalency status in terms of our regulations  
8 with CEQA. Yes, I think it open up another  
9 argument. You are correct. That probably I think  
10 there are people in this room quite capable of  
11 making that argument to Resources.

12 PRESIDING MEMBER LAURIE: Commissioner  
13 Pernell's question is would it violate CEQA. And  
14 that's not how you answered.

15 MR. MUNDSTOCK: But see it's a question  
16 of whether we are retaining our responsibility in  
17 the regulations for a functional equivalent  
18 process. And the argument could be made,  
19 depending how one interprets this, that it  
20 conflicts with our role as lead agency.

21 And since the Resources Agency has to  
22 continually ratify our regulations as allowing us  
23 to maintain this functional equivalency status, it  
24 could be another issue.

25 So I think you are raising a valid

1 concern.

2 COMMISSIONER PERNELL: But we don't  
3 know. That would be something we would have to,  
4 along with other things, research?

5 MR. MUNDSTOCK: Well, you could ask the  
6 people in this room if any of them would care to  
7 argue at the Resources.

8 COMMISSIONER PERNELL: Well, I don't  
9 know if I want to ask. I might -- okay.

10 PRESIDING MEMBER LAURIE: Okay. Thank  
11 you. Mr. Buell.

12 MR. BUELL: Yes. I'd like to try to  
13 discuss I think four sections of the regulations  
14 simultaneously. They're sections 1714, 1748, 1752  
15 and 1755.

16 All these modifications in these  
17 sections have to do --

18 PRESIDING MEMBER LAURIE: And 1741, did  
19 you include 1741?

20 MR. BUELL: Yes, 1741, 1748, 1752 and  
21 1755, all those sections of the regulations deal  
22 with demand conformance tests and modifications to  
23 other sections related to that.

24 Simply what's being proposed is the  
25 elimination of the Commission making a finding

1       regarding demand conformance. Staff does not  
2       oppose that since there was legislation passed  
3       last year, I believe, that eliminated the  
4       Commission from making that finding.

5               PRESIDING MEMBER LAURIE: Okay, thank  
6       you. Anybody have any comments? Thank you.  
7       Anybody have any conclusionary comments?

8               It would be the intent of the Committee  
9       to discuss the results of this workshop at a  
10      Committee meeting soon. I think tomorrow.  
11      Following which there will be some communication  
12      to the full Commission, whether there's a  
13      consensus or a lack of consensus as to the  
14      recommendations.

15              But these issues are of great import and  
16      interest to all the Commissioners. And so they'll  
17      be provided the opportunity to discuss them.

18              Yes, ma'am.

19              MS. SIMON: I'm sorry, Commissioner  
20      Laurie. Before we go to wrap up I did have a  
21      question about the proposed change to section  
22      1751.

23              PRESIDING MEMBER LAURIE: Okay.

24              MR. BUELL: That was the next section I  
25      was going to deal with.

1 MS. SIMON: Okay.

2 MR. BUELL: I apologize. The agenda  
3 neglected to mention that section, but that is one  
4 of the ones that's under consideration.

5 MS. SIMON: I defer to Mr. Buell, then.

6 MR. BUELL: Let me simply say that that  
7 section of the regulation deals with modifying the  
8 basis for a Commission decision. It adds language  
9 that the Presiding Member's Proposed Decision  
10 shall be based exclusively upon the hearing  
11 record, including the evidentiary record. So it's  
12 an expansion of the existing language.

13 PRESIDING MEMBER LAURIE: And the  
14 purpose for that is to make it more clear that  
15 public comment received is included as part of the  
16 hearing record, which in turn is to be the basis  
17 of the evidentiary record and the basis upon which  
18 the decision is made.

19 MS. MENDONCA: Could I ask a question on  
20 that point?

21 COMMISSIONER PERNELL: I think, if I may  
22 I think Ms. Simon had a -- she raised the  
23 objection, so if we can hear that first.

24 MS. MENDONCA: Okay.

25 MS. SIMON: Okay, --

1                   PRESIDING MEMBER LAURIE: I'm sorry, I  
2       didn't hear that you had an objection.

3                   MS. SIMON: Well, it --

4                   COMMISSIONER PERNELL: Well, maybe not  
5       an objection, but a comment or --

6                   MS. SIMON: Yes.

7                   COMMISSIONER PERNELL: -- at least  
8       brought it to our attention.

9                   MS. SIMON: Thank you, Commissioner  
10      Pernell.

11                   My concern is that hearing record is not  
12      defined anywhere in the regulations. And if one  
13      looks at section 1758, which is headed hearings,  
14      purposes and burden of proof, all the references  
15      to information in the hearings really are to what  
16      are evidentiary submissions.

17                   PRESIDING MEMBER LAURIE: I think we  
18      have an answer to that. Mr. Chamberlain.

19                   MR. CHAMBERLAIN: The hearing record is  
20      defined.

21                   MS. SIMON: Well, I'm not finding it.

22                   MR. CHAMBERLAIN: Here it is.

23                   MS. SIMON: Oh, okay, I'm sorry then, I  
24      was not looking at the right section of  
25      definition. And I may --

1                   MR. CHAMBERLAIN: We probably should  
2                   have included a comment to refer people to that  
3                   section, I'm sorry.

4                   MS. SIMON: Right. And with that  
5                   clarification I have nothing further to say.  
6                   Thank you.

7                   PRESIDING MEMBER LAURIE: Okay.

8                   MR. CHAMBERLAIN: Yeah, it's section  
9                   1702(h). And I would add a clarification that the  
10                  Resources Agency, in recently reviewing our  
11                  certification program, was concerned that the  
12                  regulation as it currently reads, without the four  
13                  words that are added, made it sound as if the  
14                  Presiding Member's Proposed Decision could only be  
15                  based on the evidentiary record, and not on  
16                  comments received, even comments from other  
17                  agencies.

18                  And so this was a commitment that we  
19                  made to them to broaden the scope of the record  
20                  that, of course, we would be using to form the  
21                  basis of the decision.

22                  PRESIDING MEMBER LAURIE: Thank you,  
23                  sir.

24                  MS. SIMON: Thank you, sorry.

25                  MS. MENDONCA: My question has to do



1 with the public comment, which is supposedly  
2 broadened by this point.

3 Many times public comment is rendered  
4 informational hearing and site visit at the end of  
5 the meeting, and goes into the transcript of that  
6 meeting. There might be public comment rendered  
7 at a status conference, which is also recorded.

8 But it's my understanding in practice  
9 that when a decision is made, the decision looks  
10 not to the public comment at the informational  
11 hearing or public comment at the status  
12 conference, but only to the public comment  
13 received at the evidentiary hearing.

14 PRESIDING MEMBER LAURIE: That is  
15 correct.

16 MS. MENDONCA: So, is this now going to  
17 mean that the hearing proposed decision will  
18 reflect public comment?

19 PRESIDING MEMBER LAURIE: No, because  
20 public comment at the informational hearing is not  
21 part of the hearing record. Well, wait a minute -  
22 - good question.

23 MS. MENDONCA: Yeah. Sorry, I'm not  
24 trying to be --

25 PRESIDING MEMBER LAURIE: The hearing

1 record --

2 MS. MENDONCA: -- an obstructionist; I'm  
3 just seeking --

4 PRESIDING MEMBER LAURIE: No, no, it's  
5 a proper -- I wouldn't support that. But I think  
6 we have to take a look at the language.

7 MS. MENDONCA: Okay, thank you very  
8 much.

9 COMMISSIONER PERNELL: So your point is  
10 to have the status conference as well as the  
11 informational hearing part of the record?

12 MS. MENDONCA: If I, as a member of the  
13 public, come to the informational hearing and site  
14 visit and express my deep concern about my  
15 children's asthma and the impacts of this project,  
16 and I don't show up at the evidentiary hearing,  
17 how is my public comment considered?

18 Unless I come to the evidentiary hearing  
19 and make public comment at that time during a  
20 formal transcribed evidentiary hearings, my public  
21 comment cannot become a part of the decision  
22 making.

23 That's my only -- I mean I'm not arguing  
24 here, I'm just saying that's how it works. So,  
25 okay, thank you.

1                   MR. CHAMBERLAIN: The definition of  
2                   hearing record that's in section 1702(h) simply  
3                   refers to public comment presented at a hearing.  
4                   So I believe the information hearing would be  
5                   included.

6                   Now whether a status conference would be  
7                   included would be a matter of interpretation.

8                   PRESIDING MEMBER LAURIE: Okay, well,  
9                   let's give further thought to that and see if it's  
10                  more complicated than necessary.

11                  MS. MENDONCA: Thank you.

12                  PRESIDING MEMBER LAURIE: Commissioner  
13                  Pernell, did you have any closing comments?

14                  COMMISSIONER PERNELL: Just to thank  
15                  everyone, the participants, and we will certainly  
16                  take all of these comments under advisement. And  
17                  there was kind of a schedule when this would get  
18                  back to the board. If the members of the public  
19                  don't have that I'm sure we can give that out  
20                  again.

21                  But I really want to thank and I  
22                  appreciate everybody coming out and giving us your  
23                  opinion. And, again, that demonstrates that this  
24                  is an open process, and we want to keep it that  
25                  way.

1 Thank you.

2 PRESIDING MEMBER LAURIE: Okay. Mr.

3 Joseph.

4 MR. JOSEPH: I'm sorry if I missed the  
5 opportunity to make a closing comment. I did want  
6 to say a couple things at the end.

7 I think there are other issues before  
8 the Commission which are deserving of your  
9 consideration when you think about revising your  
10 regulations.

11 These are in our written comments, but I  
12 just briefly wanted to tick them off so you'd be  
13 aware of what's in there.

14 As I mentioned, you are the only agency  
15 which can look at the cumulative impacts of fresh  
16 water use by new power plants in this state. And  
17 I think it's important that you adopt some sort of  
18 specific --

19 PRESIDING MEMBER LAURIE: Is that right?  
20 I mean why can't the State Water Resources Control  
21 Board, in adopting their plans, look at the  
22 cumulative impact of --

23 MR. JOSEPH: They could. It's the ball  
24 is clearly in your court right now. It may be in  
25 their court, as well. But you are the ones who

1       are licensing power plants and authorizing the use  
2       of fresh water for cooling. You know, under CEQA  
3       there's probably a good argument that you have an  
4       obligation to look at the cumulative impacts of  
5       each of these things that you're doing.

6               I think it's a policy question, and I  
7       think you should do it as a policy matter.  
8       Because if you simply decide to change policy in a  
9       particular case, that applicant would justifiably  
10      feel picked on. And, you know, hey, it was okay  
11      with the five before, why isn't it okay for me.

12             I think you should address the policy  
13      question because, you know, cumulative use of  
14      fresh water in this state is a big, big issue.

15             PRESIDING MEMBER LAURIE: And do you  
16      think we should address the question by adopting a  
17      policy or by asking the responsible agency to  
18      adopt a policy?

19             MR. JOSEPH: I think you should put a  
20      policy out there as a proposed policy, and let's  
21      see what they say. You're the ones paying  
22      attention to power plants. They have many other  
23      things on their mind, but you're paying attention  
24      to power plants. And we don't want to look back  
25      ten years from now and say, oh, my god, what did

1 we do.

2 COMMISSIONER PERNELL: Mr. Joseph, on  
3 that point, have you approached the water agencies  
4 about looking at cumulative impacts of fresh  
5 water?

6 MR. JOSEPH: No, I wanted to give you  
7 the first opportunity.

8 (Laughter.)

9 COMMISSIONER PERNELL: Okay.

10 MR. JOSEPH: You're the ones who are  
11 saying yes to power plants. And you should have  
12 the first crack at this, because you have the  
13 picture right in front of you.

14 I'm not proposing a specific outcome,  
15 but I think you should think about what that  
16 outcome should be, what the choices of outcome  
17 should be.

18 The second issue I think you should  
19 think about is fuel diversity.

20 PRESIDING MEMBER LAURIE: Fuel  
21 diversity.

22 MR. JOSEPH: Fuel diversity. You know,  
23 you all know what this is about. Plant after  
24 plant after plant, every one of them natural gas.  
25 We're putting all our eggs in one basket.

1                   Clearly you're doing a lot of work on  
2                   renewables, you know, a variety of planning to  
3                   support renewables. We need to think about are we  
4                   going to become more and more and more dependent  
5                   on natural gas. Is that a good policy.

6                   PRESIDING MEMBER LAURIE: Or do you  
7                   think we have the power in our licensing process  
8                   to implement a fuel diversity policy, as the  
9                   Warren Alquist Act is currently implemented --  
10                  currently read?

11                  MR. JOSEPH: Yes. You have the  
12                  discretion, you're making a discretionary  
13                  decision.

14                  PRESIDING MEMBER LAURIE: So you --

15                  MR. JOSEPH: You can say no, we have  
16                  enough of these plants.

17                  PRESIDING MEMBER LAURIE: -- you believe  
18                  Warren Alquist says that we can deny a natural gas  
19                  application because we want more hydro? You  
20                  believe the law currently allows us to do that?

21                  MR. JOSEPH: I don't think there's  
22                  anything in the law that precludes it.

23                  COMMISSIONER PERNELL: Well, I don't  
24                  know about hydro, because then you're --

25                  PRESIDING MEMBER LAURIE: Or anything

1       else.

2               COMMISSIONER PERNELL:  -- stepping on  
3       somebody else's toes, I mean.

4               MR. JOSEPH:  I'm not saying whose toes  
5       you want to step on.

6               COMMISSIONER PERNELL:  Nuclear -- let me  
7       ask this question.  Mr. Joseph, what is your  
8       alternative to natural gas for a 500 megawatt  
9       power plant?

10              MR. JOSEPH:  I'm not proposing  
11      alternative now.  I think it's a question that we,  
12      as a state, need to think about before we've  
13      committed ourselves down a path that we're stuck  
14      with.

15              You know, maybe we examine the question  
16      and decide there's nothing else we can do.  It is  
17      the best choice.  Maybe not.

18              COMMISSIONER PERNELL:  I agree that  
19      energy diversity is important.  Fuel diversity is,  
20      as well.  But it has to be something that, I mean  
21      it'll be difficult for us to get 500 megawatts out  
22      of photovoltaics in one particular footprint.

23              So, I mean --

24              MR. JOSEPH:  I agree, and it's not as  
25      though there's an obvious answer to this.  But as



1 a state, and as the Energy Commission, we should  
2 at least be asking the question, and see where  
3 that question leads.

4 PRESIDING MEMBER LAURIE: Well, I have  
5 to go back to my local government upbringing  
6 again, and argue that every decision that a local  
7 government makes is consistent with its general  
8 plan. The state doesn't have a general plan to be  
9 consistent with.

10 The Legislature has indicated a desire  
11 not to see a general plan that requires  
12 consistency findings. And that is currently not  
13 the law. If the law were to read that way, as an  
14 expression of legislative will, I think you would  
15 find an agency more than happy to comply.

16 MR. JOSEPH: I think the general plan  
17 notions of demand conformance are clearly not in  
18 the law anymore. But, I think it's time to step  
19 out there and so that you can look back ten years  
20 from now and say, at least we asked the question  
21 and we did the best we could; not, we ignored the  
22 whole subject.

23 And if this produces, you know, a lively  
24 debate, so much the better.

25 A related question is market impacts.

1       We are letting power plant developers decide  
2       where, when and how to connect to the grid. There  
3       are places which are better and worse.

4               PRESIDING MEMBER LAURIE: In 1998 the  
5       Legislature said to me, quote, "The market will do  
6       the planning for us." End quote.

7               Now that view may have changed. But I  
8       haven't heard that.

9               COMMISSIONER PERNELL: Well, the law  
10       hasn't.

11              PRESIDING MEMBER LAURIE: But the law  
12       has not changed.

13              MR. JOSEPH: I know I'm swimming  
14       upstream here. And I also know that we are  
15       reeling from the biggest public policy disaster in  
16       the history of this state.

17              And I think it makes good government  
18       sense for the expert agency here to take the lead.

19              PRESIDING MEMBER LAURIE: I never found  
20       that planning is necessarily inconsistent with  
21       free markets. The question of what you do with  
22       that planning, thinking about it, guiding it, in  
23       my experience, is not consistent with a successful  
24       free market. And often it's a necessary requisite  
25       thereto. There are folks who will disagree with

1 me.

2 Okay.

3 MR. JOSEPH: I think an energy general  
4 plan would be a good thing to start working on. I  
5 think you would find an enormous level of support  
6 across the street for doing that.

7 COMMISSIONER PERNELL: And would you  
8 lobby for us more PY to do all these, take the  
9 lead on these?

10 (Laughter.)

11 COMMISSIONER PERNELL: You know, I'm  
12 joking, but I think all of those are very  
13 important questions. But there's also another  
14 question of resources and how we approach this.  
15 Because obviously it will be a topic of much  
16 debate and public notice and all of the things  
17 that we do.

18 But, again, I think to stimulate the  
19 thought is a good thing. And to put it out there.

20 MR. JOSEPH: You have in this building  
21 people who are very good at resource planning.  
22 They spent a lot of years doing it --

23 COMMISSIONER PERNELL: Oh, absolutely,  
24 but the law says we can't do that anymore. We got  
25 to let the market do that.

1                   MR. JOSEPH: It doesn't say you can't.  
2                   It's now silent.

3                   COMMISSIONER PERNELL: Well, point well  
4                   taken. Before I, if I may, I was remiss or would  
5                   be if I don't recognize the work that staff did,  
6                   especially Rick, in putting this together, and  
7                   Dave, Mr. Mundstock, on keeping us on a legal  
8                   track. So we do appreciate that, and all the  
9                   other staff that participated in this, including  
10                  our very capable advisers.

11                  PRESIDING MEMBER LAURIE: Oh, really?  
12                  (Laughter.)

13                  PRESIDING MEMBER LAURIE: Absolutely.  
14                  Thank you.

15                  Okay, thank you, Commissioner Pernell.  
16                  Anybody else?

17                  Terrific. We appreciate your input very  
18                  much. You'll get adequate notice when this thing  
19                  comes back in front of the Commission, when it  
20                  does. And we expect to hear from you again.  
21                  Thank you very much.

22                  COMMISSIONER PERNELL: Thank you.  
23                  (Whereupon, at 4:50 p.m., the workshop  
24                  was adjourned.)

25   --o0o--

## CERTIFICATE OF REPORTER

I, VALORIE PHILLIPS, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Workshop; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said workshop, nor in any way interested in outcome of said workshop.

IN WITNESS WHEREOF, I have hereunto set my hand this 30th day of July, 2001.

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